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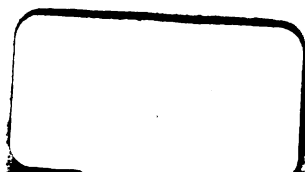
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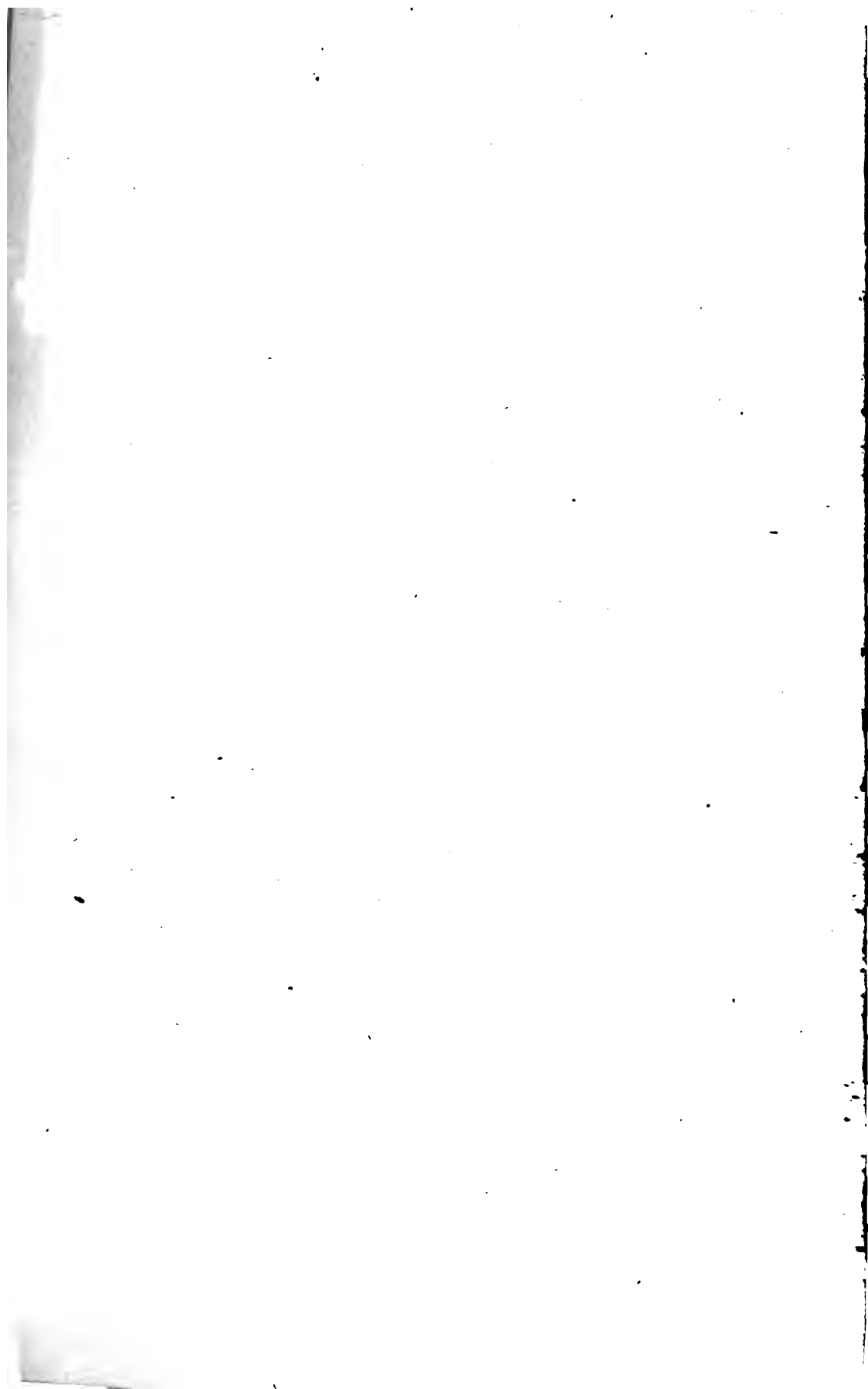
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**A PRACTICAL AND ELEMENTARY
ABRIDGMENT OF THE CASES**

ARGUED AND DETERMINED

IN THE COURTS OF

KING'S BENCH, COMMON PLEAS, EXCHEQUER, AND AT NISI PRIUS;

AND OF

THE RULES OF COURT,

FROM THE RESTORATION IN 1660, TO MICHAELMAS TERM, 4 GEORGE IV.

WITH IMPORTANT MANUSCRIPT CASES,

*ALPHABETICALLY, CHRONOLOGICALLY, AND SYSTEMATICALLY
ARRANGED AND TRANSLATED;*

WITH COPIOUS NOTES AND REFERENCES TO
THE YEAR BOOKS, ANALOGOUS ADJUDICATIONS,
TEXT WRITERS AND STATUTES,

SPECIFYING WHAT DECISIONS HAVE BEEN
AFFIRMED, RECOGNIZED, QUALIFIED, OR OVER-RULED.

COMPRISING, UNDER THE SEVERAL TITLES,

**A PRACTICAL TREATISE
ON THE DIFFERENT BRANCHES OF THE
COMMON LAW.**

BY CHARLES PETERSDORFF, ESQ.
OF THE INNER TEMPLE.

VOLUME I.



New-York:

PUBLISHED BY TREADWAY & BOGERT,
AND
GOULD & BANKS.

1829.

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A PRACTICAL and elementary abridgment of the Common Law Reports from the period they assumed a useful and intelligible form, has for a series of years been an increasing desideratum.

Rules of Law are never universal. There are always some limits affixed to their specific application. An acquaintance with the first principles which constitute the basis of our system of jurisprudence, without a corresponding knowledge of the facts and circumstances which gave rise to their establishment and promulgation, has been, therefore, at all times considered rather a source of difficulty and embarrassment than of utility to the practitioner. A comprehensive knowledge of the important qualifications engrafted upon those primary rules, when applied to particular facts, can alone be attained by consulting either the diffusive reports of cases themselves in which the doctrines were originally propounded, or those in which they have been subsequently confirmed, or by having recourse to a practical and elementary abridgment, in which the material facts, and pleadings, and the judgments, are concisely yet accurately developed. To practitioners of learning and experience, who by their constant and regular attendance in the Courts are acquainted with every new modification or extension of the law produced by each succeeding decision, the Report Books are the most satisfactory and authentic medium of reference: but to the majority of the profession, whose opportunities of acquiring legal knowledge have been limited, and whose practice has been circumscribed, no mode of obtaining information can be more uncertain or delusive than the perusal of any particular decision unconnected with the prior or subsequent cases and analogous adjudications.

It is under these impressions that the work now submitted to the public has been prepared; and from the increased business of our Tribunals, and the amplified and extended reports of their proceedings, it is presumed that the following pages will be found acceptable to every branch of the profession.

A succinct statement of the mode in which the materials are collected and arranged, will perhaps more satisfactorily evince the expediency of the publication. In detailing the structure of the work it will be proper to consider, 1st. Its general arrangement and principal divisions. 2dly. The internal or subordinate arrangement of those divisions. 3dly. The manner of abstracting or abridging the judicial determinations.

I. The general arrangement is *alphabetical*, practical utility being the primary object of the present work. Anxious attention has been directed to endeavour to insert every case under that division, which will conduce to the most prompt and ready reference, and most probably occur to the mind either of the most experienced or uninitiated member of the Profession.

II. Although the principal divisions are *alphabetical*, their internal arrangement or subordinate parts are framed, and the materials consolidated *analytically*, according to the models of the most approved writers upon each particular subject.

The cases in each subdivision of a title are inserted *chronologically*, with the view of more effectually showing and illustrating the gradual progress of our judicial polity. Where, however, a particular class of decisions consists of a variety of abstracts or abridgments, those most intimately connected are arranged in such a manner as to render their relative application more obvious.

When the same point has been determined in a series of cases, the one

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first mentioned is only abridged, and the others are referred to as confirmatory of the same principle.

To increase the value of the work, and add to its general utility, several distinct species of references or notes are subjoined to each decision.

1st A reference to the different books in which the same case is reported.

2d. A reference to the cases in which the same point has been determined or affirmed.

3d. A reference to such cases or elementary writers in which the same rule or principle is recognized or adverted to.

4th A reference to those cases which are at variance with the decision abridged, or to such as have expressly overruled it.

5th. A reference to the acts of parliament connected with each case.

6th. A series of notes, in which it has been attempted to connect the cases with the present practice, and to explain their general effect; comprising such principles of law, or essence of the cases, as are not included within the general scope of the abridgment.

The author has thus essayed to make the whole as complete as possible, so that on the one hand the present practice may be readily ascertained, whilst, on the other, the ancient adjudications may admit of an immediate access. The latter will explain, elucidate, and exemplify the former; and the reader will have in one connected view the various modifications which the law has undergone.

III. It has been endeavoured to frame the abstract of the decisions on a plan simple, plain and perspicuous. The Reports themselves generally contain a copy of the pleadings, a full statement of all the facts, the argument of the counsel at length, and almost every sentence uttered by the several Judges in pronouncing their opinions. In the present publications so much only of the pleadings, the facts, and the arguments of counsel, are introduced in a condensed form, as may be necessary to connect the facts with the decisions of the Courts; and the Judgments are compressed into one concise statement, including the most important observations, unless there be a difference of opinion on the bench, in which case the individual opinions are given *seriatim*.

Although the author, in digesting the arguments and decisions, has in general ventured to clothe the thoughts of the Advocates and Judges in language of his own—he trusts, that the force and cogency of their reasoning and obvious tendency of the judgments have not been materially diminished.

The marginal epitomes, it is hoped will be found to contain a brief, but perfect detail of the essence of the cases, and to be so arranged as to form distinct and connected treatises on each particular title or division.

To obviate the objection, that an abridgment of the Reports is not capable of being referred to with facility in consequence of the paging not corresponding with the original works, it is intended to prepare a *table of parallel references*, by which means an inquirer will be enabled to discover any case with the same promptitude and facility as if he had the Report book itself in his possession.

With the view of rendering the abridgement as complete A **SUBSTITUTE FOR THE REPORTS** as possible, and avoiding the inconvenience accruing to purchasers from the publication of new editions, it is proposed to prepare *occasional Supplements*.

NEW COURT, TEMPLE.

Dec. 1824.

**AN ALPHABETICAL LIST
OF THE
REPORTS ABRIDGED.**

Andrews.
Anstruther.

Barnardiston.
Barnes.
Barnewell and Alderson.
Barnewell and Crosswell.
Bingham.
Blackstone, William.
Blackstone, Henry.
Bosanquet and Puller.
Bosanquet and Puller. New Reports.
Broderip and Bingham.
Bunbury.
Burrow.
Burrow's, S. C.

Caldecott.
Campbell.
Carter.
Carthew.
Cases Practice, C. P.
Cases Temp. Hardwick.
Chitty.
Comberbach.
Cemyns.
Cowper.
Coke.
Croke.

Douglas.
Dowling and Ryland.
Durnford and East.
Dyer.
Dow.

East.
Espinasse.

Fitzgibbon.
Forrest.
Foster.
Fortescue.

Gew.

Hardres.
Holt.
Holt, N. P. C.

Jones, Thomas.
Jones, William.

Keble.
Kelyng.
Kenyon.

Leach.
Levinz.
Lofft.
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Maule and Selwya.
Modern Reports.
Moore, J. B.

Nolan.

Parker.
Peake.
Peere Williams.
Pollexfen.
Practical Register.
Price.

Raymond, Thomas.
Raymond, Ld.
Salkeld, Reports.
Sayer.

Saunders.
Session Cases.
Shower.
Siderfin.
Skinner.
Smith.
Starkie.
State Trials.
Strange.
Style.

Taunton.

Vaughan.
Ventris.

Wightwick.
Willes.
Wilson.

CHRONOLOGICAL TABLE

OF THE
REPORTS ABRIDGED,
WITH THE
NAMES OF THE
CHIEF JUSTICES AND CHIEF BARONS
IN EACH YEAR.

(N. B. Although the following Chronological Table commences with the year 1660, the cases determined antecedent to that time, and reported by the authors mentioned in the preceding alphabetical list, are included in the Abridgment.)

Chief Justices or Chief Barons.				Chief Justices or Chief Barons.			
A. D.	Reign.	Reporters.	Court or Courts.	A. D.	Reign.	Reporters.	Court or Courts.
1660	12 Car. 2	Siderfin	K. B. C. P.	1664	16 Car. 2	Carter	C. P.
		Hardres	Ex.			Pollexfen	K. B. C. P.
		T. Raym.	Ex.			Ca. Prac.	"
		Lev.	"	1665	17 Car. 2	Siderfin	K. B. C. P.
		Ca. Prac.	"			Hardres	Ex.
		Freeman	"			T. Raym.	Ex.
			"			Levinz	"
			"			Keble	"
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			"			Keble	"
			"			Pollexfen	"
			"			Ca. Prac.	"

CHRONOLOGICAL TABLE.

vii

Chief Justices or Chief Barons.				Chief Justices or Chief Barons.			
A. D.	Reign.	Reporters.	Court or Courts	A. D.	Reign.	Reporters.	Court or Courts
Sir John Vaughan, C. J. C. P.				Sir Mathew Hale, C. J. K. B.			
1669	21 Car. 2	Siderfin	K. B.	1673	25 Car. 2	Vaughan	C. P.
		T. Raym.	" C. P. Ex.			Ventris	K. B. "
		Levinz	"			Pollexfen	"
		Keble	"			Ca. Prac.	"
		Carter	"			Freeman	"
		Vaughan	"			Mod. Rep.	" " Ex.
		Saunders	"	Sir Frederick North, C. J. C. P.			
		S. Jones	"	1674	26 Car. 2	T. Raym.	K. B. C. P. Ex.
		Ventris	"			Levinz	"
		Pollexfen	"			Keble	"
		Ca. Prac.	"			Carter	"
		Mod. Rep.	" Ex.			T. Jones	" "
		Freeman	"			Ventris	" "
1670	22 Car. 2	Siderfin	"			Pollexfen	"
		T. Raym.	" Ex.			Ca. Prac.	"
		Levinz	"			Freeman	"
		Keble	"			Mod. Rep.	" " Ex.
		Barter	"			T. Raym.	" " Ex.
		Vaughan	"	1675	27 Car. 2	Levinz	"
		Saunders	"			Keble	"
		T. Jones	"			Carter	"
		Ventris	"			T. Jones	" "
		Pollexfen	"			Ventris	" "
		Ca. Prac.	"			Pollexfen	"
		Mod. Rep.	" Ex.			Ca. Prac.	"
		Freeman	"			Freeman	"
Sir Mathew Hale, C. J. K. B.						Mod. Rep.	" " Ex.
Sir Edward Turner, C. J. C. P.				Sir R. Rainsford, C. J. K. B.			
1671	23 Car. 2	T. Raym.	K. B. C. P. Ex.			Sir William Montague, C. B.	
		Levinz	"	1676	29 Car. 2	T. Raym.	K. B. C. P. Ex.
		Keble	"			Levinz	"
		Carter	"			Keble	"
		Vaughan	"			T. Jones	" "
		Saunders	"			Ventris	" "
		T. Jones	"			Pollexfen	"
		Ventris	"			Ca. Prac.	"
		Pollexfen	"			Freeman	"
		Ca. Prac.	"			Mod. Rep.	" " Ex.
		Mod. Rep.	" Ex.			T. Raym.	" " Ex.
		Freeman	"	1677	29 Car. 2	Levinz	"
1672	24 Car. 2	T. Raym.	" Ex.			Keble	"
		Levinz	"			T. Jones	" "
		Keble	"			Ventris	" "
		Carter	"			Pollexfen	"
		Vaughan	"			Ca. Prac.	"
		Saunders	"			Freeman	"
		Ventris	"			Mod. Rep.	" " Ex.
		Pollexfen	"	Sir W. Sroggs, C. J. K. B.			
		Ca. Prac.	"	1678	30 Car. 2	Shower	K. B.
		Freeman	"			T. Raym.	" C. P. Ex.
1673	25 Car. 2	Mod. Rep.	" Ex.			Levinz	"
		T. Raym.	" Ex.			Keble	"
		Levinz	"			Parker	" Ex.
		Keble	"			T. Jones	" "
		Carter	"				

CHRONOLOGICAL TABLE.

Chief Justices or Chief Barons.				Chief Justices or Chief Barons.			
Sir W. Scrogg, C. J. K. B.				Sir G. Jeffries, C. J. K. B.			
A. D. Reign. Reporters. Court or Courts.				Sir Thos. Jones, C. J. C. P.			
1678 30 Car. 2 Ventris K. B. C. P.				A. D. Reign. Reporters. Court or Courts.			
Pollexfen " "				1684 36 Car. 2 Shower K. B.			
Ca. Prac. " "				Skinner " "			
Mod. Rep. " "				Levinz " C. P.			
Freeman " "				Lutwyche " "			
1679 31 Car. 2 Shower " "				T. Jones " "			
T. Raym. " " Ex.				Ventris " "			
Levinz " "				Pollexfen " "			
T. Jones " "				Ca. Prac. " "			
Ventris " "				Mod. Rep. " "			
Pollexfen " "				Freeman " "			
Ca. Prac. " "				Sir E. Herbert, C. J. K. B.			
Freeman " "				1685 1 Jam. 2 Shower K. B.			
1680 32 Car. 2 Shower " "				Skinner " "			
T. Raym. " " Ex.				Comberba " "			
T. Jones " "				Levinz " C. P.			
Ventris " "				Lutwyche " "			
Pollexfen " "				Ventris " "			
Ca. Prac. " "				Ca. Prac. " "			
Freeman " "				Mod. Rep. " "			
Sir F. Pemberton, C. J. K. B.				Freeman " "			
1680 33 Car. 2 Shower K. B.				Sir Edward Atkyns, C. B.			
T. Raym. " C. P. Ex.				1686 2 Jam. 2 Shower K. B.			
T. Jones " "				Skinner " "			
Ventris " "				Comberba. " "			
Skinner " "				Levinz " C. P.			
Pollexfen " "				Lutwyche " "			
Ca. Prac. " "				Carthew " "			
Freeman " "				Parker " Ex.			
Sir F. Pemberton, C. J. C. P.				Ventris " "			
Sir E. Saunders, C. J. K. B.				Ca. Prac. " "			
1682 34 Car. 2 Shower K. B.				Mod. Rep. " "			
Skinner " "				Freeman " "			
T. Raym. " C. P. Ex.				Sir Robert Wright C. J. C. P.			
Levinz. " "				Sir Robert Wright, C. J. K. B.			
Lutwyche " "				1687 3 Jam. 2 Shower K. B.			
T. Jones. " "				Skinner " "			
Ventris " "				Comberba. " "			
Pollexfen " "				Lutwyche " C. P.			
Ca. Prac. " "				Parker " Ex.			
Freeman, " "				Ventris " "			
Mod. Rep. " "				Carthew " "			
Sir G. Jeffries, C. J. K. B.				Ca. Prac. " "			
Sir Thos. Jones, C. J. C. P.				Mod. Rep. " "			
1683 35 Car. 2 Shower K. B.				Freeman " "			
Skinner " "				Sir E. Herbert, C. J. C. P.			
T. Raym. " C. P. Ex.				1688 4 Jam. 2 Shower K. B.			
Levinz " "				Skinner " "			
Lutwyche " "				Comberba. " "			
T. Jones. " "				Lutwyche " C. P.			
Ventris " "				Carthew " "			
Pollexfen " "				Parker " Ex.			
Ca. Prac. " "				Ventris " "			
Mod. Rep. " "				Ca. Sett. " "			
Freeman " "				Ca. Prac. " "			

CHRONOLOGICAL TABLE.

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Chief Justices or Chief Barons.				Chief Justices or Chief Barons.			
A. D.	Reign.	Reporters.	Court or Courts.	A. D.	Reign.	Reporters.	Court or Courts.
Sir E. Herbert, C. J. C. P.				Sir John Treby, C. J. C. P.			
1688	4 Jam.	2 Mod. Rep.	K. B.	1692	4 Will.	3 Mod. Rep.	K. B.
		Freeman	"			Freeman	"
Sir John Holt, C. J. K. B.				1693	5 Will.	3 Shower	"
Sir H. Pollexfen, C. J. C. P.						Skinner	"
1689	1 Will.	3 Shower	K. B.			Comber.	"
		Skinner	"			Levinz	C. P.
		Comberba.	"			Lutwyche	"
		Levinz	C. P.			Carthew	"
		Lutwyche	"			Salkeld	" Ex.
		Carthew	K. B.			Ca. Sett.	"
		Salkeld	" Ex.			Holt	"
		Ventris	"			Ca. Prac.	"
		Ca. Sett.	"			Mod. K. B. C. P. Ex. N. P.	
		Holt	"			Freeman	K. B.
		Ca. Prac.	"	1693	5 Will.	3 Shower	"
		Mod. Rep.	"			Skinner	"
		Freeman	"			Comber.	"
Sir Robert Atkins, C. B.						Levinz	C. P.
1690	2 Will.	2 Shower	K. B.			Lutwyche	"
		Skinner	"			Carthew	"
		Comberba.	"			Salkeld	" Ex.
		Levinz	"			Ld. Raym.	"
		Lutwyche	"			Ca. Sett.	"
		Carthew	" Ex.			Holt	"
		Salkeld	"			Ca. Prac.	"
		Ventris	"			Mod. Rep.	" Ex.
		Ca. Sett.	"			Freeman	"
		Holt	"	Sir Edward Ward			
		Ca. Prac.	"	1695	7 Will.	3 Fortescue	" Ex.
		Mod. Rep.	"			Skinner	"
		Freeman	"			Comber.	"
1691	3 Will.	3 Shower	"			Levinz	"
		Skinner	"			Lutwyche	"
		Comber.	"			Carthew	"
		Levinz	"			Salkeld	" Ex.
		Lutwyche	"			Ld. Raym.	"
		Carthew	"			Comyns	" Ex.
		Salkeld	" Ex.			Ca. Sett.	"
		Ca. Sett.	"			Holt	"
		Holt	"			Ca. Prac.	"
		Ca. Prac.	"			Mod. Rep.	" Ex.
		Mod. Rep.	"			Freeman	"
		Freeman	"			P. Wms.	" Ex.
Sir George Treby, C. J. C. P.				1696	8 Wils.	3 Fortescue	" Ex.
1692	4 Will.	3 Shower	K. B.			Skinner	"
		Skinner	"			Comber.	"
		Comber.	"			Levinz	"
		Levinz	C. P.			Lutwyche	"
		Lutwyche	"			Kelynge	"
		Parker	Ex.			Carthew	"
		Carthew	"			Salkeld	"
		Salkeld	" Ex.			Ld. Raym.	" Ex.
		Ca. Sett.	"			Comyns	" Ex.
		Holt	"			Ca. Sett.	"
		Ca. Prac.	"			Holt	"

CHRONOLOGICAL TABLE.

Chief Justices or Chief Barons. Sir Edward Ward, K. B.				Chief Justices or Chief Barons. Sir Thomas Trevor, C. J. C. P.			
A. D.	Reign.	Reporters.	Court or Courts.	A. D.	Reign.	Reporters.	Court or Courts.
1696	8 Will.	3 Ca. Prac.	K. B.	1701	13 Will.	3 Salkeld	K. B. C. P. Ex.
		Mod. Rep.	" C. P. Ex.			Ld. Raym.	" "
		Freeman	"			Lutwyche	" "
		P. Wms.	" " Ex.			Ca. Prac.	" "
1697	9 Will.	3 Fortescue	" " Ex.			Holt	" "
		Skinner	"			Ca. Sett.	" "
		Comber.	"			Fortescue	" " Ex.
		Lutwyche	"			Comyns	" " Ex.
		Carthew	"			Mod.	" " Ex.
		Salkeld	" " Ex.			Freeman	" "
		Ld. Raym.	" " Ex.	1702	1 Anne	Salkeld	" " Ex.
		Comyns	" " Ex.			Ld. Raym.	" " Ex.
		Ca. Sett.	"			Lutwyche	" "
		Holt	"			Ca. Prac.	" "
		Ca. Prac.	"			Holt	" "
		Mod. Rep.	" " Ex.			Comyn	" " Ex.
		Freeman	"			Fortescue	" " Ex.
1698	10 Will.	3 Fortescue	" " Ex.			Ca. Sett.	" "
		Comber.	"			Mod.	" "
		Lutwyche	"			Freeman	" "
		Parker	" Ex.	1703	2 Anne	Salkeld	" " Ex.
		Carthew	"			Ld. Raym.	" "
		Salkeld	" " Ex.			Lutwyche	" "
		Ld. Raym.	" " Ex.			Ca. Prac.	" "
		Comyns	" " Ex.			Holt	" "
		Ca. Sett.	"			Comyns	" " Ex.
		Holt	"			Fortescue	" " Ex.
		Ca. Prac.	"			Mod.	" "
		Mod. Rep.	" " Ex.			Freeman	" "
		Freeman	"	1704	3 Anne	Salkeld	" " Ex.
1699	11 Will.	3 Fortescue	" " Ex.			Ld. Raym.	" "
		Lutwyche	" " Ex.			Prac. Reg.	" "
		Parker	" Ex.			Ca. Prac.	" "
		Carthew	"			Holt	" "
		Salkeld	" " Ex.			Comyns	" " Ex.
		Ld. Raym.	" " Ex.			Fortescue	" " Ex.
		Ca. Sett.	"			Mod.	" "
		Comyns	" " Ex.			Freeman	" "
		Holt	"	1705	4 Anne	Salkeld	" " Ex.
		Ca. Prac.	"			Ld. Raym.	" "
		Mod. Rep.	" " Ex.			Ca. Prac.	" "
		Freeman	"			Holt	" "
1700	12 Will.	3 Fortescue	" " Ex.			Fortescue	" " Ex.
		Lutwyche	" " Ex.			Comyns	" " Ex.
		Parker	" Ex.			Ca. Sett.	" "
		Carthew	"			Mod.	" "
		Salkeld	" " Ex.			Freeman	" "
		Ld. Raym.	" " Ex.			Gibb.	" Ex.
		Comyns	" " Ex.	1706	5 Anne	Salkeld	" " Ex.
		Ca. Sett.	"			Ld. Raym.	" "
		Holt	"			Ca. Prac.	" "
		Ca. Prac.	"			Holt	" "
		Mod. Rep.	" " Ex.			Fortescue	" " Ex.
		Freeman	"			Comyns	" "
		P. Wms.	" " Ex.			Mod. Rep.	" "

CHRONOLOGICAL TABLE.

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Chief Justices or Chief Barons.				Chief Justices or Chief Barons.			
A. D.	Reign.	Reporters.	Court or Courts.	A. D.	Reign.	Reporters.	Court or Courts.
Sir Thomas Trevor, C. J. C. P.				Sir T. Parker, C. J. K. B.			
1707	5 Anne	Freeman	K. B.			Sess. Ca.	K. B.
		Gilb.				Fortescue	C. P. Ex.
1707	6 Anne	Salkeld	" "			Mod.	"
		Ld. Raym.	" "			Gilb.	Ex.
		Ca. Prac.	" "	1713	12 Anne	Ld. Raym.	" "
		Parker				Prac. Reg.	" "
		Holt				Ca. Prac.	" "
		Comyns	" "			Parker	Ex.
		Fortescue	" "			Holt	
		Mod.	" "			Bunbury	Ex.
		Gild.				Comyns	" "
1708	7 Anne	Salkeld	" "			Fortescue	" "
		Ld. Raym.	" "			Ca. Sett.	" "
		Ca. Prac.	" "			Sess. Ca.	" "
		Parker				Mod.	" "
		Holt				Gilb. Ca.	Ex.
		Comyns	" "	1714	13 Anne	Ld. Raym.	" "
		Fortescue	" "			Ca. Prac.	" "
		Mod.	" "			Parker	Ex.
		Gilb.				Holt	
Sir T. Parker, C. J. K. B.						Bunbury	Ex.
1709	8 Anne	Salkeld	K. B. C. P. Ex.			Comyns	" "
		Ld. Raym.	" "			Fortescue	" "
		Prac. Reg.	" "			Ca. Sett.	" "
		Ca. Prac.	" "			Gilb. Ca.	" "
		Parker				Sess. Ca.	" "
		Holt				Mod.	" "
		Comyns	" "			Gilb.	Ex.
		Fortescue	" "	Sir Peter King, C. J. C. P.			
		Mod.	" "	Sir Samuel Dood, C. B.			
		Gilb.		1715	1 Geo. 1	Ld. Raym.	K. B. C. P.
1710	9 Anne	Salkeld	" "			Ca. Prac.	" "
		Ld. Raym.	" "			Prac. Reg.	" "
		Ca. Prac.	" "			Holt	
		Parker				Bunbury	Ex.
		Holt				Comyns	" "
		Comyns	" "			Fortescue	" "
		Fortescue	" "			Ca. Sett.	" "
		Ca. Sett.	" "			Sess. Ca.	" "
		Mod.	" "			Mod. Rep.	" "
		Gilb.				Gilb.	Ex.
1711	10 Anne	Salkeld	" "	Sir Thomas Bury, C. B.			
		Ld. Raym.	" "	1716	2 Geo. 1.	Strange	K. B. C. P. Ex.
		Ca. Prac.	" "			Ca. Prac.	" "
		Prac. Reg.	" "			Prac. Reg.	" "
		Parker				Holt	" "
		Comyns	" "			Bunbury	Ex.
		Fortescue	" "			Comyns	" "
		Mod. Rep.	" "			Fortescue	" "
		Ca. Sett.	" "			Ca. Sett.	" "
		Gilb.				Sess. Ca.	" "
1712	11 Anne	Ld. Raym.	" "			Mod. Rep.	" "
		Ca. Prac.	" "			Gilb.	Ex.
		Parker		1717	3 Geo. 1.	Strange	" "
		Comyns	" "			Ca. Prac.	" "
		Ca. Sett.	" "			Prac. Reg.	" "

CHRONOLOGICAL TABLE.

Chief Justices or Chief Barons. Sir Thomas Bury, C. B.					Chief Justices or Chief Barons. Sir James Montague, C. B.				
A. D.	Reign.	Reporters.	Court or Courts.		A. D.	Reign.	Reporters.	Court or Courts.	
1717	3 Geo. 1.	Bunbury	Ex.		1722	8 Geo. 1.	Mod. K. B.		
		Comyns	K. B. C. P. Ex.				Gilb.		Ex.
		Fortescue	" " Ex.		1723	9 Geo. 1.	Strange K. B. C. P.		Ex.
		Ca. Sett.	" " "				Ca. Prac.	" "	
		Sess. Ca.	" " "				Prac. Reg.	" "	
		Mod. Rep.	" " "				Bunbury		Ex.
		Gilb.		Ex.			Comyns	" "	Ex.
1718	4 Geo. 1.	Strange	" " Ex.				Fortescue	" "	Ex.
		Ca. Prac.	" " "				Ca. Sett.	" "	
		Prac. Peg.	" " "				Sess. Ca.	" "	
		Bunbury		Ex.			Mod.	" "	
		Parker		Ex.			Gilb.		Ex.
		Comyns	" " Ex.				Sir Robert Eyre, C. B.		
		Fortescue	" " Ex.		1724	10 Geo. 1.	Strange K. B. C. P.		Ex.
		Ca. Sett.	" " "				Ld. Raym.	" "	
		Sess. Ca.	" " "				Ca. Prac.	" "	
		Mod. Rep.	" " "				Prac. Reg.	" "	
		Gilb.		Ex.			Bunbury		Ex.
		Sir John Pratt, C. J. K. B.					Comyns	" "	Ex.
1719	5 Geo. 1.	Strange	K. B. C. J. Ex.				Fortescue	" "	Ex.
		Ca. Prac.	" " Ex.				Ca. Sett.	" "	
		Prac. Reg.	" " "				Sess. Ca.	" "	
		Bunbury		Ex.			Mod.	" "	
		Comyns	" " Ex.				Gilb.		Ex.
		Fortescue	" " Ex.		1725	11 Geo. 1.	Strange	" "	Ex.
		Ca. Sett.	" " "				Ld. Raym.	" "	
		Sess. Ca.	" " "				Ca. Prac.	" "	
		Mod.	" " "				Prac. Reg.	" "	
		Gilb.		Ex.			Bunbury		Ex.
		Sir John Pratt, C. J. K. B.					Comyns	" "	Ex.
1720	5 Geo. 1.	Strange	K. B. C. P. Ex.				Fortescue	" "	Ex.
		Ca. Prac.	" " "				Ca. Sett.	" "	
		Prac. Reg.	" " "				Sess. Ca.	" "	
		Bunbury		Ex.			Mod.	" "	
		Comyns	" " Ex.				Gilb.		Ex.
		Fortescue	" " Ex.				Sir R. Raymond, C. J. K. B.		
		Ca. Sett.	" " "				Sir R. Eyre, C. J. C. P.		
		Sess. Ca.	" " "				Sir J. Gilbert, C. B.		
		Mod. Rep.	" " "		1726	12 Geo. 1.	Strange K. B. C. P.		Ex.
		Gilb.		Ex.			Ld. Raym.	" "	
1721	7 Geo. 1.	Strange	" " Ex.				Ca. Prac.	" "	
		Ca. Prac.	" " "				Prac. Reg.	" "	
		Prac. Reg.	" " "				Bunbury		Ex.
		Bunbury		Ex.			Comyns	" "	Ex.
		Comyns	" " Ex.				Fortescue	" "	Ex.
		Fortescue	" " Ex.				Sess. Ca.	" "	
		Mod.	" " "				Ca. Sett.	" "	
		Gilb.		Ex.			Barnard.	" "	Ex.
1722	8 Geo. 1.	Strange	" " Ex.				Mod.	" "	
		Ca. Prac.	" " "				Gilb.		Ex.
		Prac. Reg.	" " "				Sir Thomas Singelby, C. B.		
		Bunbury		Ex.	1727	13 Geo. 1	Strange K. B. C. P.		Ex.
		Comyns	" " Ex.				Ld. Raym.	" "	
		Fortescue	" " Ex.				Ca. Prac.	" "	
		Ca. Sett.	" " "				Prac. Reg.	" "	
		Sess. Ca.	" " "				Bunbury		Ex.

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Chief Justices or Chief Barons.				Chief Justices or Chief Barons			
Sir Thomas Singelby, C. B.				Sir James Reynold, C. B.			
A. D.	Reign.	Reporters.	Court or Courts.	A. D.	Reign.	Reporters.	Court or Courts.
1727	13 Geo. 1	Comyns	K. B. C. P. Ex.	1731	4 Geo. 2	Fitzgibbon	K. B. C. P. Ex.
		Fortescue	" "	Ex. 1732	5 Geo. 2	Strange	" " Ex.
		Sess. Ca.	" "			Ld. Raym.	" "
13 Geo. 1		Ca. Sess.	" "			Ca. Prac.	" "
		Barnard.	" "			Prac. Reg.	" "
		Mod.	" "			Bunbury	" " Ex.
1728	1 Geo. 2	Strange	" " Ex.			Comyns	" " Ex.
		Ld. Raym.	" "			Barnes	" "
		Ca. Prac.	" "			Sett. Ca.	" "
		Prac. Reg.	" "			Fortescue	" " Ex.
		Bunbury	" " Ex.			Ca. Sett.	" "
		Comyns	" " Ex.			Sess. Ca.	" "
		Fortescue	" " Ex.			Mod.	" "
		Ca. Sett.	" "			Fitzgibbon	" " Ex.
		Sess. Ca.	" "			Kelynge	" " Ex.
		Barnard.	" "			Lord Hardwicke, C. J. K. B.	
		Mod.	" "	1733	6 Geo. 2	Strange	K. B. C. P. Ex.
		Fitzgibbon	" " Ex.			Ld. Raym.	" "
1729	2 Geo. 2	Strange	" " Ex.			Ca. Prac.	" "
		Ld. Raym.	" "			Prac. Reg.	" "
		Ca. Prac.	" "			Bunbury	" " Ex.
		Prac. Reg.	" "			Comyns	" " Ex.
		Bunbury	" " Ex.			Barnes	" "
		Comyns	" " Ex.			Sett. Ca.	" "
		Ca. Sett.	" "			Fortescue	" " Ex.
		Sess. Ca.	" "			Sess. Ca.	" "
		Fortescue	" " Ex.			Mod.	" "
		Barnard.	" "			Kelynge	" "
		Mod.	" "	1734	7 Geo. 2	Strange	" " Ex.
		Fitzgibbon	" " Ex.			Ca. T. Har.	" "
		Sir James Reynolds, C. B.				Ca. Prac.	" "
1730	3 Geo. 2	Strange	K. B. C. P. Ex.			Prac. Reg.	" "
		Ld. Raym.	" "			Bunbury	" " Ex.
		Ca. Prac.	" "			Comyns	" " Ex.
		Prac. Reg.	" "			Fortescue	" " Ex.
		Bunbury	" " Ex.			Sess. Ca.	" "
		Comyns	" " Ex.			Burr. S. C.	" "
		Fortescue	" " Ex.			Barnes	" "
		Ca. Sett.	" "			Mod.	" "
		Sess. Ca.	" "			Cunning.	" "
		Barnard.	" "			Kelyng.	" " Ex.
		Mod.	" "			Mod. Rep.	" "
		Fitzgibbon	" " Ex.			Sir Thomas Reeve, C. J. C. P.	
1731	4 Geo. 2	Strange	" " Ex.	1735	8 Geo. 2	Strange	K. B. C. P. Ex.
		Ld. Raym.	" "			Ca. T. Har.	" "
		Ca. Prac.	" "			Ca. Prac.	" "
		Prac. Reg.	" "			Prac. Reg.	" "
		Bunbury	" " Ex.			Bunbury	" " Ex.
		Comyns	" " Ex.			Comyns	" " Ex.
		Fortescue	" " Ex.			Fortescue	" " Ex.
		Ca. Sett.	" "			Barnes	" "
		Sess. Ca.	" "			Burr. S. C.	" "
		Kelynge	" " Ex.			Cunning.	" "
		Barnard.	" "			Kelyng.	" " Ex.
		Mod.	" "				" "

CHRONOLOGICAL TABLE.

Chief Justices or Chief Barons, Sir John Willes, C. J. C. P.				Chief Justices or Chief Barons, Sir Edward Probyn, C. B.			
A. D.	Reign.	Reporters.	Court or Courts.	A. D.	Reign.	Reporters.	Court or Courts.
1736	9 Geo. 2	Strange	K. B. C. P. Ex.	1741	14 Geo. 2	Barnes	C. P.
		Ca. T. Har.	"			Burr. S. C.	K. B.
		Ca. Prac.	"			Sess. Ca.	"
		Prac. Reg.	"			Sir Thomas Parker, C. B.	
		Bunbury	Ex.	1742	15 Geo. 2	Strange	K. B. C. P. Ex.
		Comyns	"			Ca. Prac.	"
		Fortescue	"			Barnes	"
		Barnes	"			Burr. S. C.	"
		Burr. S. C.	"			Sess. Ca.	"
		Sess. Ca.	"			Leach C. L.	"
		Sir William Lee, C. J. K. B.		1743	16 Geo. 2	Strange	"
1737	10 Geo. 2	Strange	K. B. C. P. Ex.			Ca. Prac.	"
		Ca. T. Har.	"			Parker	"
		Ca. Prac.	"			Foster C. L.	Ex.
		Prac. Reg.	"			Wilson	"
		Bunbury	Ex.			Barnes	"
		Comyns	"			Burr. S. C.	"
		Fortescue	"			Sess. Ca.	"
		Barnes	"			Leach C. L.	"
		Burr. S. C.	"	1744	17 Geo. 2	Strange	"
		Sess. Ca.	"			Ca. Prac.	"
		Sir John Comyns, C. B.				Foster C. L.	"
1738	11 Geo. 2	Strange	K. B. C. P. Ex.			Wilson	"
		And.	"			Parker	Ex.
		Ca. Prac.	"			Barnes	"
		Prac. Reg.	"			Burr. S. C.	"
		Bunbury	Ex.			Sess. Ca.	"
		Comyns	"			Leach C. L.	"
		Barnes	"	1745	18 Geo. 2	Strange	"
		Burr. S. C.	"			Ca. Prac.	"
		Sess. Ca.	"			Wilson	"
		Leach C. L.	"			Parker	Ex.
1739	12 Geo. 2	Strange	"			Foster C. L.	"
		Andrews	"			Barnes	"
		Ca. Prac.	"			Burr. S. C.	"
		Prac. Reg.	"			Sess. Ca.	"
		Bunbury	Ex.	1746	19 Geo. 2	Strange	"
		Comyns	"			Ca. Prac.	"
		Barnes	"			Wilson	"
		Burr. S. C.	"			Parker	Ex.
		Sess. Ca.	"			Foster C. L.	"
		Sir Edward Probyn, C. B.				Barnes	"
1740	13 Geo. 2	Strange	K. B. C. P. Ex.			Burr. S. C.	"
		Ca. Prac.	"			Sess. Ca.	"
		Prac. Reg.	"			Leach C. L.	"
		Bunbury	Ex.	1747	20 Geo. 2	Strange	"
		Comyns	"			Blackstone	Ex.
		Barnes	"			Ca. Prac.	"
		Burr. S. C.	"			Wilson	"
		Sess. Ca.	"			Barnes	"
		Leach C. L.	"			Burr. S. C.	"
1741	14 Geo. 2	Strange	"			Parker	Ex.
		Ca. Prac.	"			Foster P. C.	"
		Prac. Reg.	"			Leach C. L.	"
		Bunbury	Ex.			Sess. Ca.	"

CHRONOLOGICAL TABLE.

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Chief Justices or Chief Barons. Sir Thomas Parker, C. B.				Chief Justices or Chief Barons. Sir Dud. Ryder, C. J. K. B.			
A. D.	Reign.	Reporters.	Court or Courts.	A. D.	Reign.	Reporters.	Court or Courts.
1748	21 Geo. 2	Strange	K. B. C. P. Ex.	1755	28 Geo. 2	Parker	Ex.
		Blackstone	" " Ex.			Foster C. C.	"
		Ca. Prac.	"			Barnes	"
		Wilson	" " Ex.			Burr. S. Ca.	"
		Parker	Ex.			Leach C. L.	"
		Foster C. C.	"			Lord Mansfield, C. J.	"
		Barnes	"	1756	29 Geo. 2	Wilson	"
		Leach C. L.	"			Sayer	"
		Burr. S. Ca.	"			Ca. Prac.	"
1749	22 Geo. 2	Blackstone	" " Ex.			Parker	Ex.
		Ca. Prac.	"			Foster C. C.	"
		Wilson	"			Barnes	"
		Parker	Ex.			Burr. S. Ca.	"
		Foster C. C.	"			Leach C. L.	"
		Barnes	"	1757	30 Geo. 2	Blackstone	"
1750	23 Geo. 2	Blackstone	" " Ex.			Burrow	"
		Wilson	"			Wilson	"
		Parker	Ex.			Ca. Prac.	"
		Ca. Prac.	"			Parker	Ex.
		Foster C. C.	"			Foster C. C.	"
		Barnes	"			Barnes	"
		Burr. S. Ca.	"			Burr. S. Ca.	"
1751	24 Geo. 2	Blackstone	" " Ex.	1758	31 Geo. 2	Blackstone	"
		Wilson	"			Burrow	"
		Ca. Prac.	"			Wilson	"
		Parker	Ex.			Ca. Prac.	"
		Foster C. C.	"			Parker	Ex.
		Barnes	"			Foster C. C.	"
		Burr. S. Ca.	"			Barnes	"
1752	25 Geo. 2	Wilson	" " Ex.			Burr. S. Ca.	"
		Sayer	"	1759	32 Geo. 2	Blackstone	"
		Ca. Prac.	"			Burrow	"
		Parker	Ex.			Wilson	"
		Foster C. C.	"			Ca. Prac.	"
		Barnes	"			Parker	Ex.
		Burr. S. Ca.	"			Foster C. C.	"
1753	26 Geo. 2	Wilson	" " Ex.			Barnes	"
		Sayer	"			Burr. S. Ca.	"
		Ca. Prac.	"			Leach C. L.	"
		Parker	Ex.	1760	33 Geo. 2	Blackstone	"
		Foster C. C.	"			Burrow	"
		Barnes	"			Wilson	"
		Burr. S. Ca.	"			Ca. Prac.	"
		Sir Dud. Ryder, C. J.	"			Parker	Ex.
1754	27 Geo. 2	Wilson	" " Ex.			Foster C. C.	"
		Sayer	"			Barnes	"
		Ca. Prac.	"			Burr. S. Ca.	"
		Parker	Ex.			Leach C. L.	"
		Foster C. C.	"	1761	1 Geo. 3	Blackstone	"
		Barnes	"			Burrow	"
		Burr. S. Ca.	"			Wilson	"
		Leach C. L.	"			Ca. Prac.	"
1765	28 Geo. 2	Wilson	" " Ex.			Parker	Ex.
		Sayer	"			Burr. S. Ca.	"
		Ca. Prac.	"			Leach C. L.	"

CHRONOLOGICAL TABLE.

Chief Justices or Chief Barons. Sir Charles Pratt, C. J. C. P.				Chief Justices or Chief Barons. Sir J. Wilmot, C. J. C. P.			
A. D.	Reign.	Reporters.	Court or Courts.	A. D.	Reign.	Reporters.	Court or Courts.
1762	2 Geo. 3	Blackstone	" "	1770	10 Geo. 3	Ca. Prac. K. B.	
		Burrow	" "			Burr. S. Ca. "	
		Wilson	" "			Leach C. L. "	
		Ca. Prac.	" "			Sir W. de Grey, C. J. C. P.	
		Parker		Ex. 1771	11 Geo. 3	Blackstone K. B. C. P.	
		Burr. S. Ca.	" "			Burrow	" "
1763	3 Geo. 3	Blackstone	" "			Wilson	" "
		Burrow	" "			Ca. Prac.	" "
		Wilson	" "			Burr. S. Ca.	" "
		Ca. Prac.	" "			Leach C. L.	" "
		Parker		Ex.		Sir S. S. Smythe, C. B.	
		Lofft.	" "	1772	12 Geo. 3	Blackstone K. B.	" "
		Burr. S. Ca.	" "			Burrow	" "
		Leach C. L.	" "			Wilson	" "
1764	4 Geo. 3	Blackstone	" "			Ca. Prac.	" "
		Burrow	" "			Lofft.	" "
		Wilson	" "			Burr. S. Ca.	" "
		Ca. Prac.	" "			Leach C. L.	" "
		Parker		Ex. 1773	13 Geo. 3	Blackstone	" "
		Burr. S. Ca.	" "			Wilson	" "
		Leach C. L.	" "			Ca. Prac.	" "
1765	5 Geo. 3	Blackstone	" "			Lofft.	" "
		Burrow	" "			Burr. S. Ca.	" "
		Wilson	" "			Leach C. L.	" "
		Ca. Prac.	" "	1774	14 Geo. 3	Blackstone	" "
		Parker		Ex.		Cowper	" "
		Burr. S. Ca.	" "			Wilson	" "
		Leach C. L.	" "			Ca. Prac.	" "
		Sir J. Wilmot, C. J. C. P.				Lofft.	" "
1766	6 Geo. 3	Blackstone K. B. C. P.				Burr. S. Ca.	" "
		Burrow	" "			Leach C. L.	" "
		Wilson	" "	1775	15 Geo. 3	Blackstone	" "
		Ca. Prac.	" "			Cowper	" "
		Parker		Ex.		Burr. S. Ca.	" "
		Burr. S. Ca.	" "			Leach C. L.	" "
		Leach C. L.	" "	1776	16 Geo. 3	Blackstone	" "
1767	7 Geo. 3	Blackstone	" "			Cowper	" "
		Burrow	" "			Burr. S. Ca.	" "
		Wilson	" "			Leach C. L.	" "
		Ca. Prac.	" "			Sir John Skynner, C. B.	
		Burr. S. Ca.	" "	1777	17 Geo. 3	Blackstone K. B.	" "
1768	8 Geo. 3	Blackstone	" "			Cowper	" "
		Burrow	" "			Cald. S. C.	" "
		Wilson	" "			Leach C. L.	" "
		Ca. Prac.	" "	1778	18 Geo. 3	Blackstone	" "
		Burr. S. Ca.	" "			Cowper	" "
		Leach C. L.	" "			Cald. S. C.	" "
1669	9 Geo. 3	Blackstone	" "			Leach C. L.	" "
		Burrow	" "	1779	19 Geo. 3	Blackstone	" "
		Wilson	" "			Douglas	" "
		Ca. Prac.	" "			Cald. S. C.	" "
		Burr. S. Ca.	" "			Leach C. L.	" "
1770	10 Geo. 3	Blackstone	" "			Lord Loughborough, C. J. C. P.	
		Burrow	" "	1780	20 Geo. 3	Blackstone K. B. C. P.	
		Wilson	" "			Douglas	" "

CHRONOLOGICAL TABLE.

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Chief Justices or Chief Barons.				Chief Justices or Chief Barons.			
Lord Loughborough, C. J. C. P.				Sir A. Macdonald, C. B.			
A. D.	Reign.	Reporters.	Court or Courts.	A. D.	Reign.	Reporters.	Court or Courts.
1780	20 Geo. 3	Cald. S. C.	K. B.	1796	36 Geo. 3	Espinasse	N. P.
		Leach. C. L.	"			Anstruther	Ex.
1781	21 Geo. 3	Douglas	"	1797	37 Geo. 3	T. R.	K. B.
1782	22 Geo. 3	Cald. S. C.	"			Espinasse	N. P.
		Leach. C. L.	"			Bos. & Pul.	C. P.
1783	23 Geo. 3	Cald. S. C.	"			Anstruther	Ex.
		Leach. C. L.	"	1798	38 Geo. 3	T. R.	"
1784	24 Geo. 3	Cald. S. C.	"			Bos. & Pul.	"
		Leach. C. L.	"			Espinasse	N. P.
1785	25 Geo. 3	T. R.	"	Lord Eldon, C. J. C. P.			
		Leach. C. L.	"	1799	39 Geo. 3	T. R.	K. B.
1786	26 Geo. 3	T. R.	"			Bos. & Pul.	C. P.
		Leach. C. L.	"			Espinasse	N. P.
Sir James Eyre, C. J. C. P.				1800	40 Geo. 3	T. R.	"
Lord Kenyon, C. J. K. B.						East	"
1787	27 Geo. 3	T. R.	K. B.			Leach C. L.	"
		Leach. C. L.	"			Bos. & Pul.	C. P. Ex.
1788	28 Geo. 3	T. R.	"			Forrest	Ex.
		H. Bl.	C. P.			Espinasse	N. P.
		Leach. C. L.	"	Lord Alvanley, C. J. C. P.			
1789	29 Geo. 3	T. R.	"	1801	41 Geo. 3	East	K. B.
		H. Bl.	"			Leach C. L.	"
		Leach. C. L.	"			Bos. & Pul.	C. P.
1790	30 Geo. 3	T. R.	"			Forrest	Ex.
		H. Bl.	"			Espinasse	N. P.
		Peake	N. P.	Lord Ellenborough, C. J. K. B.			
1791	31 Geo. 3	T. R.	"	1802	42 Geo. 3	East	K. B.
		H. Bl.	"			Leach C. L.	"
		Nolan	"			Bos. & Pul.	C. P.
		Peake	"			Espinasse	"
1792	32 Geo. 3	T. R.	"	1803	43 Geo. 3	East	"
		Nolan	"			Leach C. L.	"
		H. Bl.	"			Bos. & Pul.	"
		Peake	"			Espinasse	N. P.
		Anstruther	Ex.	Sir John Mansfield, C. J. C. P.			
Sir James Eyre C. J. C. P.				1804	44 Geo. 3	East	K. B.
Sir A. Macdonald, C. B.						Leach, C. L.	"
1793	33 Geo. 3	T. R.	K. B.			Bos. & Pul.	C. P.
		Nolan	"			New Rep.	"
		H. Bl.	C. P.			Espinasse	N. P.
		Peake	N. P.	1805	45 Geo. 3	East	"
		Anstruther	Ex.			Leach C. L.	"
		Espinasse	N. P.			New Rep.	"
1794	34 Geo. 3	T. R.	"			Espinasse	"
		H. Bl.	"	1806	46 Geo. 3	East	"
		Peake	"			New Rep.	"
		Espinasse	"			Espinasse	"
		Anstruther	Ex.	1807	47 Geo. 3	East	"
1795	35 Geo. 3	T. R.	"			Chitty	"
		H. Bl.	"			Leach C. L.	"
		Peake	N. P.			New Rep.	"
		Espinasse	"			Taunton	"
		Anstruther	Ex.			Espinasse	N. P.
1796	36 Geo. 3	T. R.	"			Campb.	N. P.

CHRONOLOGICAL TABLE.

Chief Justices or Chief Barons.				Chief Justices or Chief Barons.			
A. D.	Reign.	Reporters.	Court or Courts.	A. D.	Reign.	Reporters.	Court or Courts.
Sir J Mansfield, C. J. C. P.				Sir A Thompson, C. B.			
1808	48 Geo. 3	East	K. B.	1816	56 Geo. 3	Marshall	C. P.
		Taunton				Price	Ex.
		Espinasse	N. P.			Campb.	N.P.
		Campb.	N. P.			Starkie	N.P.
1809	49 Geo. 3	East	"			Holt	N.P.
		Leach C. L.	"			Sir R. Richards, C. B.	
		Taunton	C. P.	1817	57 Geo. 3	Bar. & Ald. K. B.	
		Campb.	N. P.			Chitty	"
1810	50 Geo. 3	East	"			Taunton	"
		Leach C. L.	"			Moore	C. P.
		Taunton	"			Price	Ex.
		Wightw.	Ex.			Starkie	N.P.
		Espinasse	N. P.			Holt	N.P.
		Campb.	N. P.			Sir C. Abbot, C. J. K. B.	
1811	51 Geo. 3	East	"			Sir R. Dallas, C. J. C. P.	
		Taunt.	"	1818	58 Geo. 3	Bar. & Ald. K. B.	
		Wight.	Ex.			Chitty K. B.	
		Camp.	N. P.			Taunton	C. P.
1812	52 Geo. 3	East	"			Moore	"
		Chitty	"			Bro. & Bing.	"
		Leach C. L.	"			Price	Ex.
		Taunton	"			Starkie	N.P.
		Campb.	N. P.			Gow	N.P.
1813	53 Geo. 3	Maule & Sel.	"	1819	59 Geo. 3	Bar. & Ald. K. B.	
		Chitty	"			Chitty K. B.	
		Taunton	"			Taunton	C. P.
		Marshall	"			Moore	"
		Campb.	N. P.			Price	Ex.
		Sir V. Gibbs, C. J. C. P.				Starkie	N.P.
1814	54 Geo. 3	Maule & Sel. K. B.				Gow	N.P.
		Chitty K. B.		1820	60 Geo. 3	Bar. & Ald. K. B.	
		Leach C. L.	"		1 Geo. 4	Chitty	"
		Taunton	C. P.			Bro. & Bing.	C. P.
		Marshall	"			Moore	"
		Sir A. Thompson, C. B.				Price	Ex.
		Price	Ex.	1821	2 Geo. 4	Bar. & Ald.	"
		Campb.	N. P.			Bro. & Bing.	"
1815	55 Geo. 3	Maule & Sel. K. B.				Moore	"
		Chitty K. B.				Price	Ex.
		Marshall	C. P.	1822	3 Geo. 4	Bar. & Ald.	"
		Taunton	"			Dow. & Ry.	"
		Price	Ex.			Bro. & Bing.	"
		Campb.	N. P.			Moore	"
		Starkie	N. P.			Price	Ex.
		Holt	N. P.	1823	4 Geo. 4	Bar. & Cres.	"
1816	56 Geo. 3	Maule & Sel. K. B.				Dow. & Ry.	"
		Chitty	"			Bing.	"
		Taunton	C. P.			Moore	"

GLOSSARY

OF

ABBREVIATIONS AND REFERENCES

ADOPTED IN THIS WORK.

Abbott.	Abbott on Shipping.	Bro. V. M.	Brown's Vade Mecum.
Abr. Ca. Eq.	Abridgment of Cases in Equity.	— Meth.	— Methodus Novissima.
Act.	Acton's Reports.	B. N. C.	Brooke's New Cases.
Act. Reg.	Acta Regia.	Brownl.	Browlow and Gouldborough's Reports.
Adam's Eject.	Adam's Ejectment.	— Rediv. or Ent.	— Redivivus.
Al.	Aleyn's Reports.	Buck.	Buck's Reports.
Amb.	Ambler's Reports.	Bull. N. P.	Buller's Nisi Prius.
And.	Anderson's Reports.	Bulst.	Bulstrode's Reports.
Andr.	Andrew's Reports.	Bunb.	Bunbury's Reports.
Ast.	Anstruther's Reports.	Burn. J.	Burn's Justice.
Ass. or Lib. Ass.	Liber Assissarum.	— Ecc L.	— Ecclesiastical Law.
Ast. Ent.	Aston's Entries.	Burr.	Burrow's Reports.
Atk.	Atkyn's Reports.	— S. C.	— Settlement Cases
Atk. P. T.	— Parliamentary Tracts.		
Ayl.	Ayliffe.	Ca. Sett.	Cases of Settlement.
Bac. Abr.	Bacon's Abridgment	Cal. or Calth.	Callis, Calthorpe.
Ball. and B.	Ball and Beatty's Reports.	Cald.	Caldecott's Reports.
Banc. Sup.	Upper Bench.	Cald. Arb.	Cadwell on Arbitration.
Barnard.	Barnadiston's K. B. Reports.	Campb.	Campbell's Reports.
Barn. C.	— Chancery Reports.	Carter.	Carter's Reports.
Barnes.	Barnes Notes of Practice.	Carth.	Carthew's Reports.
B. and A.	Barnwell and Alderson's Rep.	Cary.	Carey's Reports.
B. and C.	— Creswell.	Cas. B. R.	Cases Tempore W. III.
Bayl.	Bayley on Bills.	— L. Eq.	— in Law and in Equity.
Belt's Sup.	Bel's Supplement to Vesey,	Ca. Prac. C. P.	— of Practice Common Pleas
	Sen's Reports.	Ca. T. K.	Select Cases Tempore King.
Benl.	Benloe's Reports.	Ca. Temp. Hard.	Cases Tempore Hardwicke.
Bing. L. and T.	Bingham's Landlord & Tenant	Ca. T. Talb.	— Talbot.
Bing. Rep.	— Reports.	Champ. L. and T.	Chamber's Landlord & Tenant
Bl.	Blount.	Ch. Ca.	Chancery Cases.
Black.	Blackerby's Justice.	Ch. Pre.	Precedents in Chancery.
Blac. Com.	Blackstone's Commentaries.	Ch. R.	Reports in Chancery.
H. Bl.	H. Blackstone's Reports.	Chit. B.	Chitty on Bills.
W. Blac.	W. Blackstone's Reports.	— Com. L.	Chitty's Commercial Law.
Bligh.	Bligh's Reports.	— Crim. L.	— Criminal Law.
Booth.	Booth's Real Actions.	— Game L.	— Game Laws.
B. And P.	Bosanquet and Puller's Rep.	— Pl.	— on Pleading.
Bosc.	Boscawen's Convictions.	— Rep.	— Reports of Practice.
Bott.	Bott's Poor Laws.	Chris. B. L.	Christian's Bankrupt Laws.
— Const.	— continued by Const.	Clayt.	Clayton's Reports.
Bro.	Brady and Bracton.	Cl. Ass.	Clerk's Assistant.
Bradby.	Bradby on Distress.	Clift.	Clift's Entries.
Brid.	Bridgman's Reports on Con-	Cod. or Cod. Jur.	Codex (Juris Civilis) Gibson's
	vveyancing	Co.	Coke's Reports.
B. And B.	Broderip and Bingham's Rep.	— Cop.	— Copyholder.
Br. Bro.	Brooke, Brown.	— Ent.	— Entries.
Bro. Ab.	Brook's Abridgment.	— M. C.	— Magna Charta (2d. In-
Br. Brev. Jud. and		— P. C.	stitute.)
Ent.	Brownlow Brevia Judicialia.	— Lit.	— Pleas of the Crown (3d
Bro. C. C.	Browne's Chancery Cases.	— Comb.	Institute)
— C. L.	— Civil Law.	Com.	Coke on Littleton.
— Ent.	Brown's Entries.		Comberbach's Reports.
— P. C.	— Parliamentary Cases.		Cemyn's Reports.

GLOSSARY OF ABBREVIATIONS.

Com. Dig.	Comyn's Digest.	Giba. Codex	Gibson's Codex Juris Civilis.
— L. and T.	— Landlord and Tenant.	Gilb.	Gilbert's Cases in Law and Equity.
Cooke B. L.	Cooke's Bankrupt Laws.	— Eq. or Rep.	— Reports in Equity.
Co. Ep. P.	Cooper's Equity pleading.	Eq.	— Common Pleas.
Coop.	— Chancery Reports	— C. P.	— Distresses
Cot. Ab.	Cotton's Abridg't of Records.	— Dis.	— Executions.
Cowp.	Cowper's Reports.	— Ex.	— Evidence.
Cox.	Coxe's Cases.	— Ev.	— Exchequer.
Cro. Car.	Croke's Charles.	— Exch.	— King's Bench.
— Eliz.	— Elizabeth.	— K. B.	— Uses.
— Jac.	— James.	— Us.	
Crompt. J. C.	Crompton's Jurisdiction of Courts.	G. and J.	Glyn and Jameson's Bankruptcy Cases.
C. C. C.	Crown Circuit Companion.	Godb.	Godbolt's Reports.
Cruise.	Cruise's Digest of Real Property.	Godol.	Godolphin.
Cno.	Cunningham's Reports.	Godson.	Godson on Patents and Copyright.
			Goldsbrough's Reports
Dal.	Dalison's Reports.	Golds.	Gow's Nisi Prius Reports.
Dalt. Just.	Dalton's Justice.	Gow. N. P.	Grotius de Jure Belli.
— Sh.	— Sheriff.	Gro. de, J. B.	Gwilliam's Tithes Cases.
Dan.	Daniell's Reports.	Gwill.	
D'Anv. Ab.	D'Anvers's Abridgment.		Haggard's Reports.
Dav.	Davy's Reports.	Hagg.	Hale's Pleas of the Crown.
Deg.	Dege's Parson's Counsellor.	Hale. P. C.	— Summary
D'Ew.	D' Ewe's Journal.	— Sum.	— Common Law.
Dick.	Dickins's Reports.	— C. Law.	Hand's Practice.
Dick. Guide.	Dickinson's Guide to Quarter Sessions.	Hand's Prac.	Hansard's Entries.
	Digest of Writs.	Hana. Eat.	Hardres's Reports.
Dig.	Doctor and Student.	Hardt.	Hawkins's Pleas of the Crown.
D. and S.	Dodsons's Reports.	Hawk. P. C.	Herne's Precedents.
Dods.	Douglas's Reports.	Her. Prac.	Hatley's Reports.
Dough.	Dow's Reports.	Hat.	Highmore on Lunacy.
Dow.	Dowling and Ryland's Rep.	Highm. Lan.	— on Mortmain.
D. and R.	Dugdale's Origines Judicialis.	Highm.	Hobart's Reports.
Dugd. D. J. or Jud.	— Summenses.	Hob.	Reports Temp. Holt.
— Sum.	Duke's Charitable Uses.	Holt.	Holt's Nisi Prius Reports.
Duke.	Danford and East, or Term Reports.	Holt's N. P.	— Shipping.
Durnf. and East,	Dyer's Reports.	— Sh.	Howell's Collection of State Trials.
or T. R.		Howell's St. Tr.	
Dy.			Hughes's Entries.
	East's Reports.	Hugh. Ent.	Hullock on Costs.
East.	— Pleas of the Crown.	Hull. Costs.	Hutton's Reports.
— P. C.	Eden's Cases Time Northington	Ha.	
Eden.	Eden on Injunctions.		Impey's Common Pleas.
Eden Inj.	Edward's Admiralty Reports.	Imp. C. P.	— King's Bench.
Edw.	Equity Cases Abridged.	Imp. K. B.	— Modern Pleading.
Eq. Ab.	Earl of Coventry's Case.	Imp. M. Pl.	— Sheriff
E. of Cov.	Espinasse's Reports.	Imp. Sh.	Jatinian's Institute, lib. 1. t. 2.
Esp. N. P.	— Digest.	Inst.	Jacob and Walker's Reports.
— Dig.		J. and W.	Jenkin's Reports.
		Jenk.	Sir William Jones's Reports.
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A
PRACTICAL ABRIDGMENT
OF THE
REPORTS OF CASES
ARGUED AND DETERMINED
IN THE
COURTS OF KING'S BENCH, COMMON PLEAS, AND EXCHEQUER,
FROM THE
RESTORATION IN 1660, TO MICHAELMAS TERM, 4 GEO. 4.

Abandonment. See tit. Insurance; Poor, Settlement of.

Abate. See tit. Common; Nuisance; Trespass.

Abatement of suit.

I. BY DEATH.

(A) BEFORE VERDICT OR JUDGMENT BY DEFAULT.

(a) Of a sole plaintiff, p. 1. (b) Of one of several plaintiffs, p. 2. (c) Of a sole defendant, p. 3. (d) Of one of several defendants, p. 4.

(B) AFTER VERDICT, AND BEFORE FINAL JUDGMENT, p. 5.

(C) AFTER FINAL JUDGMENT, p. 6.

(D) AFTER WRIT OF ERROR—See tit. Error Writ of.

(E) OF THE KING. p. 6.

II. BY BANKRUPTCY—See tit. Bankrupt; Insolvent Debtor.

III. BY COVERTURE—See tit. Abatement, Pleas in; Baron & Feme.

IV. FOR WANT OF PROPER PARTIES—See tit. Misjoinder; Nonjoinder; Parties to Actions.

I. BY DEATH.

(A) BEFORE VERDICT OR JUDGMENT BY DEFAULT.

(a) Of a sole plaintiff.

CUTFIELD V. CORNEY. M. T. 1758. C. P. 2 Wils. 83.

This was an action of replevin; the plaintiff, it appeared, had died after declaration, but before the defendant had made his avowry; and on a motion that the latter might have a writ *de retorno habendo*, it was determined by the Court that the suit had abated by the death of the plaintiff, and that the writ therefore ought not to issue. A suit abates by the death of a sole plaintiff before verdict.

See Co. Lit. 139; 10 Co. 134. a; Reg. Pl. 293; Ast. Ent. 8; Cro. Car. 509; March. 65; 1 Sid. 143; 1 Salk. 9; Ca. Temp. Hard. 395; 1 Wils. 315; 1 Com. Dig. Abatement, bb. 33; 1 Vin. Ab. 148. [2]

(b) Of one of several plaintiffs.

DACRES V. DUNKIN. H. T. 1671-2. K. B. 2 Lev. 82; S. C. 3 Keb. 127;

S. P. WEDGEWOOD V. BAYLY. H. T. 1680. K. B. 2 Show. 177; S. C. Skin. 93; 1 Freem. 532. Before the stat. 8 & 9 W. 3. c. 11 s. 7 * the death of one of several plaintiffs abated the suit.

To an action of trover, defendant pleaded in abatement that the plaintiff had brought another action for the recovery of the same property, and averred that it was still pending; replication that H. and P. are dead. Demurrer to replication. *Per Cur.* In all actions the death of a plaintiff is an abatement of the suit. Judgment *respondens ouster*.

* By stat. 8 & 9 W. 3. c. 11. s. 6. 7. it is enacted, "if there be two or more plaintiffs or

ABATEMENT OF SUIT.—By Death.

See 25 Ed. 3. 38; 25 Ed. 3. 81. pl. 13; -2 Bulst. 262; 1 Lev. 165. Carter 193-4; Moore 9. 17. 10; Co. Lit. 135. a; Yelv. 209; 1 Vent. 235; 3 Mod. 249; Com. Dig. Abatement, H. 33; 1 Vin. Ab. 48.

But since that act, if one of several plaintiffs die before the last continuance, if the cause of action survive, the suit does not abate.

2. **LOWTHER AND WIFE v. KELLEY.** H. T. 1722. K. B. 8 Mod. 115.

In covenant on an indenture of lease in which the defendant had covenanted with the plaintiffs to pay a reserved rent, the defendant pleaded in abatement the death of one of the plaintiffs since the last continuance.

Per Cur. We cannot quash the plea on a motion; the plaintiff should have suggested the death on the roll according to the statute, and have proceeded in his action.

See 1 Stra. 705; Lord Raym. 1418; 1 Com. Dig. Abatement, H. 35.

3. **REX v. COHEN.** M. T. 1816. 1 Stark N. P. C. 511.

The death of a co-plaintiff must be suggested on the roll, in conformity with 8 & 9 W. 3. c. 11. s. 6. otherwise the action will abate.

On an indictment for perjury it appeared that an action had been brought by two plaintiffs, one of whom had died pending the suit, but no suggestion of the death was made on the roll, pursuant to 8 & 9 W. 3. c. 11. s. 6. At the trial of that cause the defendant had given evidence, and there perjured himself.

Per Lord Ellenborough. As no suggestion of the death has been entered, I am of opinion that the suit abated; it would be incomprehensible to say that taking an oath in an unauthorised cause amounted to perjury. Defendant acquitted.

See *vide*, as to the suggestion, **Far v. Denn**, 1 Burr. 363; **Newnham v. Law**, 5 T. R. 577; and see 1 B. & P. 482; 2 id. 110. 337; 4 M. & S. 329; 1 Vin. Ab. 53. pl. 15; post, "Entry of Suggestion upon the Roll."

(c) Of a sole defendant.

[3]

1. **SIBBET v. RUSSELL.** M. T. 1735. K. B. Ca. Temp. Hard. 183. S. P. WALLOP v. IRWIN. H. T. 1752. K. B. 1 Wils. 315.

The death of a sole defendant before the time allowed for pleading has expired abates the suit.

Upon a motion to set aside a judgment and a *scire facias* thereon, the matter was referred to the master, who reported, that the declaration was delivered the 9th of June, the rule to plead on the 13th, that a summons had been taken out before a judge at his chambers on the 18th for time to plead to the 25th, but that in fact the defendant died at Bath on the 18th, though the attorneys knew nothing of it, and therefore defendant's attorney did not plead within the time given, and on the 26th the plaintiff signed his judgment, and afterwards sued out a *scire facias* against the executors. Upon this report the judgment and *scire facias* were set aside. And *per Cur.* Suppose there had been no further time given to plead, but after the rule for pleading was out, defendant had died, and judgment had been signed after his death, surely that would not be a good judgment; the order for time to plead was never intended to bind the party; as if judgment had been signed on the day on which the rule for pleading was expired. The stat. 8 & 9 W. 3. c. 11. s. 6. will not vary the case at all.

3. **ANON.** M. T. 1706-7. K. B. 1 Salk. 8. 11; Mod. 137. by the name of **Falmouth v. Strode**, S. C.

So will the death of a sole defendant before the actual commission days of the assizes.

In an action of ejectment the defendant died the day before the commencement of the assizes; a verdict being found for the plaintiff, a motion was made on behalf of the defendant in arrest of judgment. *Per Cur.* The death of either party before the assizes is not remedied by the statute 17 Car. 2. c. 8. but if the party dies after the assizes have begun, although the trial be subse-

quently, and one or more of them die, if the cause of action shall survive to the surviving plaintiffs or defendants or against the surviving defendant or defendants, the writ of action shall not be thereby abated, but such death being suggested upon the record, the action shall proceed at the suit of the surviving plaintiff or plaintiffs against the surviving defendant or defendants." The preceding stat. it should seem extends only to cases where the plaintiff dies pending the writ, and not to instances where one of several persons named as plaintiffs in the process was dead at the time the writ was sued out; in the latter case, the death would still be pleadable in abatement as at common law. *Vide* 20 H. 6. 30. 18 E. 4. 1; 2 H. 7. 16; Clif. Ent. 6. Ra. Ent. 126; and post Abatement, Pleas in, p. 10.

quent to his death, such a case is within the remedy of the act, for the assizes, in contemplation of law, are but one day.

See Yelv. 152; Cro. Car. 509; 1 Sid. 131; 1 Leon. 278; 1 Mod. 6; Ca. Temp. Hard. 373; 3 Lev. 120; 6 Mod. 142; Raym. 210; 1 Lev. 279; 1 Vent. 235; And. 157; Com. Dig. Abatement, H. 34.

3. PLUMMER v. WEBB. M. T. 1729. K. B. 2 Lord Raym. 1415, n. S. P. But if a defendant die after the first day of the assizes, though before the hearing of the cause, suit does not abate; [4]

JACOBS v. MINICONI. M. T. 1796. K. B. 7 T. R. 31. 32. note.

Debt on bond, plea *non est factum*; verdict and judgment for the plaintiff; error assigned that Webb died before the day of *nisi prius*.

Per Cur. This objection is not assignable for error, because the record alleges that the defendant appeared upon that day. Judgment affirmed.

See 2 Tidd. Prac. 942. 7th ed.; et supra.

4. TAYLOR v. HARRIS. M. T. 1803. C. P. 3 B. & P. 549.

Notice of trial had been given in this cause for the first sittings in Easter Term, and subsequently postponed to the second sittings. The defendant died on the night preceding the intended trial. A verdict was found for the plaintiff on the following day and judgment regularly signed by the plaintiff, who had notice of the defendant's death. Rule *nisi* to set the judgment aside. Pleas set aside a verdict and judgment when the defendant had died before the actual day of sitting in term.

Per Cur. As the sittings in term neither commence with nor from any part of the term, but are only held on particular days appointed by the Chief Justice, a verdict obtained at them after the death of the defendant cannot be supported. R. Ab. See 2 Tidd. 942. 7th ed. and 1 Leon. 278; Cro. Car. 509; 1 Sid. 231; 1 Burr. 363; 1 Vin. Ab. 55; Com. Dig. Abatement, H. 33.

(d) Of one of several defendants.

1. ELLWAIES v. LUCY. M. T. K. B. 3 Salk. 117.

Trespass against four defendants, who all appeared; but three of them after the last continuances pleaded that the other had died, "et petunt iudicium de brevi et quod breve prædict cassetur;" upon demurrer to the plea, it was adjudged ill, because the defendants should have concluded "et petunt iudicium si curia ulterius procedere vult," for the writ actually abated by the death of one of several co-defendants. Prior to the 8 & 9 W. 3. c. 11. the death of one of several co-defendants before verdict abated the suit.

See numerous other cases decided before the stat. 8 & 9 W. 3. c. 11. referred to in 1 Com. Dig. Abatement, H. 35; 1 Vin. Ab. 51; 1 Bac. Ab. Abatement, F. 8; Cro. Car. 509; And. 57, 58; Harris v. Philips, M. T. 1659; Hardres, 161. cited per Lee, C. J. in Middleton v. Croft, Ca Temp. Hard. 399.

2. WIRRAL v. BRAND. F. T. K. B. 1 Lev. 165; S. C. Raym. 131; 1 Keb. 906; 1 Sid. 259.

Assumpsit against two executors on the promise of their testator, *plea non assumpsit*; during the progress of the suit one of the defendants died, his death was duly suggested on the roll, and a verdict found for the plaintiff. On the Court being moved in arrest of judgment, they determined that the suit abated, and that the judgment should be stayed. Or of one of several co-contractors.

See Woodward v. Davis, 1 Plowd. 186; et supra.

(B) AFTER VERDICT, AND BEFORE FINAL JUDGMENT.

1. SMITH v. IRISH. M. T. 1669. K. B. 1 Mod. 4. S. C. 2 Keb. 548. [5]

Judgment had been entered as of Trinity Term; a writ of inquiry was sued out returnable in M. T. the plaintiff died in the intermediate vacation. The death of plaintiff between the day of *nisi prius* and the day in bank will

Per Cur. The first judgment being an interlocutory and not a final judgment, the action abated by the plaintiff's death. See Burnett v. Holden, 1 Mod. 6; 2 Kel. 49; 1 Lev. 277; Ray. 210; S. C. Semb. contra, Comb. 293;

* This act provides that where there are two or more defendants, if one or more of them die, and the cause of action survive against the survivors, the action shall not thereby be abated, but, such death being suggested upon the record, the action shall proceed against the survivors. (As to entering the suggestion, see 1 Burr. 563; 5 T. R. 577; Barnes 469; 1 Stark. 511; and post tit. "Entry of Suggestions on the Roll.") If however, one of several persons, against whom an action purports to be brought, were dead at the time of suing out the process, this matter might still be pleaded in abatement.

abate the action.*

An action for a libel is abated by the death of the plaintiff between interlocutory judgment and the next day in bank.

After interlocutory judgment has been signed, the death of the plaintiff in the same term will not so abate the suit as to prevent the Court from granting a rule to compute principal and interest on a bill of exchange.

After outlawry of one of two defendants, and before final judgment, the other dies, the right survives against the outlaw.

[6] The death of either party after final judgment does not abate the suit.†

Cro. Car. 509; 1 Keb. 477; 3 Keb. 169. 466; 3 T. R. 347; Com. Dig. Abatement, H. 33; 1 Bac. Ab. Abatement, H.

2. IRELAND v. CHAMPNEYS. E. T. 1813. C. P. 4 Taunt 884.

After a writ of enquiry had been executed at the assizes in an action for a libel, the damages assessed, and before the next day in bank, the plaintiff died. His executors nevertheless entered up final judgment. A rule nisi was obtained to set the judgment aside. *Per Cur.* The suit abated by the death of the plaintiff. R. Ab. See 17 Car. 2. c. 8. s. 1; 8 and 9 W. 3. c. 11. s. 6; 1 Taunt. 385. 7; Aid. 571; 1 B. Moore, 278.

3. BERGER v. GREEN. H. T. 1813. K. B. 1 M. & S. 229.

Interlocutory judgment in an action on a bill of exchange had been signed on the 27th of January, the plaintiffs died on the 30th, and a rule to compute principal and interest was obtained on the 1st of February. It was contended that as these proceedings had been within the same term, that a *scire facias* was unnecessary, and that when final judgement was signed it would relate back to first day of the term.

In this opinion the Court concurred, and the rule to compute was made absolute. Chitty on Bills, 370. 6th edit.; T. R. 20.

4. FORT v. OLIVER AND ANOTHER. H. T. 1813. K. B. 1 M. & S. 242.

An action had been brought against two defendants, one of whom died after the other had been outlawed, and subsequent to interlocutory, but before final judgment.

Per Cur. These circumstances do not alter the right; it remains as it originally stood. The plaintiff is entitled to proceed against the survivor.

(C) AFTER FINAL JUDGMENT.

CLERK v. WITHERS. M. T. 1703. 6 Mod. 290; S. C. 11 Mod. 34; S. C. 2. Ld. Raym. 1072; S. C. 1 Salk. 322; Holt. 303.

F. D. administrator of J. D. recovered against C on a bond given to his intestate. On judgment by default in the Common Pleas execution was sued out directed to the sheriff of London, returnable in Michaelmas Term, and delivered to the sheriffs the 1st of August, who on the same day levied the amount of the execution; F. D. died in September following; the sheriff returned that he had seized the value, but that the goods remain in his custody for want of purchasers; in September the sheriff was removed and another elected. The plaintiff afterwards sued out a *scire facias* against the then sheriff for restitution of the goods; and on demurrer judgment was given against the plaintiff in the Common Pleas, and a writ of error brought in the King's Bench.

* The 17 Car. 2. c. 8. enacts, when either party dies between verdict and judgment, "his death shall not be alleged for error so as the judgment be entered within two terms after the verdict." By a subsequent statute, 9 W. 3. c. 118. s. 6. it is enacted, that in all actions to be commenced in any court of record, if the plaintiff or defendant happen to die after interlocutory and before final judgment, the action shall not abate by reason thereof, if such action might have been originally prosecuted or maintained by or against the executors or administrators of the party dying; but the plaintiff, or, if he be dead after such interlocutory judgment, his executors or administrators, shall and may have a *scire facias* against the defendant, if living after such interlocutory judgment, or, if he died after, then against his executors or administrators, to show cause why damages in such action should not be assessed and recovered by him or them. And by the same statute, if there be two or more plaintiffs or defendants, and one or more of them die, if the cause of action survive to the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants, the writ or action shall not be thereby abated; but such death being suggested upon the record, the action shall proceed at the suit of the surviving plaintiff or plaintiffs against the surviving defendant or defendants. See *Wallop v. Irwin*, 1 Wils. 215; *Sibbet v. Russell*, Ca. Temp. Hard. 183; 3 Mod. 189. n.

† *Vide post*, tit. "Executor and Administrator;" "Execution;" "Judgment;" "*Scire facias*;" and see 15 H. 7. 166; Fitz. Execution. 242, 1 Roll. Ab. 900. 2; 2 Bac. Ab. Execution, G. 2; 6 Bac. Ab. *scire facias*, c. 4; 2 Ld. Ray. 808; 1 Salk. 314; 1 Show 464; 2 Saund. 50, K; Cro. Eliz. 459; 1 Saund. 219. E. F.; 1 Com. Dig. Abatement, H. 34.

Per Cur. The judgment must be affirmed. Executions are favoured in law, and the levy vests the property in the sheriff, and the act of selling is but a formal part of the execution, and therefore as the levy was complete in F. D.'s life time, his subsequent death does not abate the writ.

See *Ld. Raym.* 40; 12 *Mod.* 60, n; 1 *Burr.* 30; 17 *Car.* 2, c. 8; 1 *Sid.* 29; *Cro. Car.* 450; *Dyer*, 99; *Moore*, 778; *Yelv.* 44; 2 *Saund.* 47; 1 *Vent.* 52; 1 *T. R.* 658; 1 *Mod.* 30; 1 *Sid.* 438; 1 *Lev.* 282; *Cro. Eliz.* 319; *Cro. Jac.* 194; 1 *Co.* 96; *Cro. Car.* 459; 1 *Salk.* 320; 2 *Saund.* 344; 1 *Leon.* 304; *Com. Rep.* 34; 3 *Salk.* 159; 5 *Mod.* 176; 1 *Salk.* 320; 4 *Bac. Ab.* 460; 3 *Com. Dig.* 308; *Vin. Abr.* A. 2, pl. 18, (2 a 2) pl. 144, pl. 409; 2 *Roll. Rep.* 57; *Noy.* 73; 5 *Co.* 90; 1 *Jones*, 215; *Hob.* 10; 1 *Keb.* 313; 4 *Mod.* 404; 1 *Roll. Abr.* 893; *Gillb. Ex.* 22; *Ra. En.* 164; *Godb.* 276; 2 *Keb.* 789; 5 *Mod.* 384; 10 *Mod.* 412; *Cro. Car.* 381; *Lord Raym.* 1051; 1 *Mod.* 34; 1 *Salk.* 323; 1 *Salk.* 264; *Carth.* 149

(E) BY THE DEATH OF THE KING.*

1. MEMORANDUM, C. P. 3 *Lev.* 207.

It was resolved by a majority of the Court, that actions of debt upon penal statutes do not abate by the death of the king.

See *Cro. Car.* 10; *Hutt*, 82.

2. *Rex v. THEED*, H. T. 1716, 1 *Stra.* 43.

A *scire facias* had been brought to repeal the grant of a market; it was objected that as the writ had been sued out in the late queen's time, the proceedings had abated by her demise. But *Per Cur.* This is an original writ, and within the general words of the statute 1 E. 6. c. 7, and 1 Ann. c. 8, and does not abate. See *Com. Dig.* Abatement, H. 38.

3. *THE KING v. POWELL*, M. T. 1727, K. B. 13, 2 *Stra.* 782.

In this case it was holden, that proceedings on an information in nature of a *quo warranto*, do not abate by the demise of the crown. See *Rex v. Archbishop of Armagh*, 2 *Stra.* 837; and post, tit. *Quare impedit*.

Actions qui tam do not abate by the death of the king.

[7]

Or a writ of *scire facias* to repeal a grant.

Or an information in the nature of a *quo warranto*.

Abatement.—Pleas in.—In civil proceedings *

I TO THE JURISDICTION—See tit. Jurisdiction, Pleas to, and tit. Ancient Demesne, Attorney, Cinque Ports, Connusance, Counties Palatine, Privilege.

II. TO THE DISABILITY OF THE PERSON.

(A) OF THE PLAINTIFF.

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(B) OF THE DEFENDANT.

* By stat. 1 *Edw. 6. c. 7.* it is enacted, that no action, suit, bill, or plaint, depending between party and party in any court of record, shall be discontinued, and put without delay; by reason of the death of the king, but the process, pleas, demurrers and continuances, shall stand good in the same condition as if the king had lived. This statute, however, does not extend to actions in a county court, or other court of record, 7 *Co.* 80. b. nor did it extend to actions, &c. at the suit of the king, 7 *Co.* 31; 2 *Cro.* 14; until by stat. 1 *Ann. c. 8.* it was enacted, that no writ, plea, process, or other proceeding on any indictment or information, or for any debt to her Majesty, or her successors, shall be discontinued and put without delay by her or their death, but shall continue in force and be proceeded upon. And no original writ of *nisi prius*, commission, process, or proceeding, out of any court of equity, or upon any office or inquisition, nor any writ of *certiorari* or *habeas corpus*, in any case criminal and civil, nor any writ of attachment or process for contempt, shall be abated or discontinued by the death of the queen or her successors.

† In Criminal proceedings, *vide post*, p. 74.

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II. TO THE DISABILITY OF THE PERSON.

(A) OF THE PLAINTIFF.

(a) *Fictitious person.*

ANON. E. T. 1751. K. B. 1 Wils. 302.

The defendant pleaded in abatement that the plaintiff named in the writ was a fictitious person; the replication negated this allegation. Demurrer and joinder; but as the latter concluded in chief instead of an abatement, leave was given by the Court to amend. See as to the principal point 18 E. 4, 4; 1 Com. Dig. Abatement, E. 1; Bac. Ab. Abatement. 1; Gilb. C. P. 248; see Precedents, Petersdorff's Index, 142.

Defendant may plead in abatement that plaintiff is a fictitious person. [10]

(b) *Death of plaintiff.*

MARKS V. NOTTINGHAM. T. T. 1671. C. P. 2 Vent. 196.

The defendant pleaded in abatement that the plaintiff named in the writ died before the commencement of the suit. The Court doubted whether the plea could be sustained.

That it is sustainable see 1 Com. Dig. Abatement, E. 17; Bac. Ab. Abatement, L. Doc. Pl. 3; 1 Chit. Pl. 436; ante, p. 1; and for precedents, Petersdorff's Index, 105.

Query, whether the death of the plaintiff before writ is sued can be pleaded in abatement. To an action on a bond by an executor the defendant may plead that the testator was an alien enemy, but it should appear that he continued such on the face of the pleadings till the time of his death.

(c) *An alien enemy*—See tit. Alien.

1. WELLS V. WILLIAMS. M. T. 1695. C. P. 1 Lutw. 34; 1 Salk. 8; 1 Ld. Raym. 284. S. C.

In debt on bond by the plaintiff as executor, the defendant pleaded in abatement that the testator was an alien. Replication that the testator at the time of executing the bond, and ever after till the period of his death, lived in England, under the license and protection of the king. Demurrer and joinder.

Per Cur. It does not appear but that the testator might have come over to England in the time of peace, and have always continued to reside here without interruption, which in law would be equivalent to a license. Judgment, *quod respondeas ouster*.

See Dy. 2; Benl. 10; Cro. Eliz. 142; 1 Com. Dig. Abatement, E. 4; 1 Bac. Ab. Abatement, 3, 3; Gilb. C. P. 205; 1 Camp. 481; Precedents, Petersdorff's Index, 18; and see 6 T. R. 23; 6 Taunt. 332; 3 M. & S. 533.

2. WEST V. SUTTON. E. T. 1695. K. B. 1 Salk. 2; S. C. 2 L. Raym. 853.
- Per Cur.* Alien enemy cannot be pleaded in abatement to a *scire facias*, for the defendant, having permitted the plaintiff to obtain judgment, has recognized his capability to sue, and shall not afterwards, be allowed to dispute it. See 1 Brownl. 4; Co. Lit. 239, b.

3. PENTIN V. JENKINS, E. T. 1691. K. B. 1 Show. 349.
- Action of trespass—assault and battery. The defendant pleaded that the

Alien enemy cannot be pleaded to a *scire facias* on a

Plea of alien born is valid, tho' it is not said de patre et matre extra ligentiam; plaintiff was *alienigena et natus extra ligentiam in partibus transmarinis*, viz. at St. Maloe's, in France, *sub obedientia Ludovici, &c. inimici regis et regum*; demurrer to plea.

Per Cur. The plea is well enough, although it does not say *de patre et matre*.
4. DERRIER v. ARNAUD. H. T. 1694. 4 Mod. 405.

The defendant pleaded that the plaintiff was alienigena in regno Francie sub ligeanigena adversarii domini regis, &c. oriundus.

Or natus, but only, was alienigena; it should have been *natus*, and not *oriundus*; but the Court, after perusing Rast. Ent. 252, 605, held that the plea was sufficient.

See this case cited and commented upon by Lord Kenyon, in *Casseres v. Bell*, S. T. R. 166; and 2 Stra. 1082; 1 Bac. Ab. 4; 4 Bac. Ab. 97; 1 Com. Dig. Abatement, E. 4.

[11]

The plea must show that the plaintiff is an alien enemy.
5. OPENHEIMER v. LEVY. M. T. 1737. K. B. 2 Stra. 1737; S. C. Andr. 76.

In an action of *assumpsit* the defendant pleaded in the abatement that the plaintiff was an alien born at Vienna, and out of the allegiance of the king of England, to which the plaintiff demurred.

Per Cur. As an alien friend may maintain a personal action, it is necessary, in order to abate the writ, that the plea should show the party to be an alien enemy, which is not to be presumed, nor the contrary necessary to be shown in the replication. See And. 25.

6. CASSERES v. BELL. H. T. 1799. 8 T. R. 166.

And ought strictly to negative every right in the plaintiff under any circumstances to have a locus standi in curia.
The defendant in this action pleaded that the plaintiff was an alien, born in foreign parts, to wit, in the French Netherlands, out of the allegiance, &c. and under the allegiance, &c. of a foreign state, and that that country was and still is at open war with and enemies of the king, to wit, at, &c. Demurrer to plea.

Per Cur. A defendant who pleads that the plaintiff is an alien enemy must set forth all those facts in his plea which demonstrate the incapacity of the former to sue in an English court; it should show not only that he is an alien, but that he is an enemy of our king; the plaintiff should not be driven to reply to any of the facts necessary to establish his right as an alien friend to maintain his action.

Vide *supra*, *Openheimer v. Levy*; and *Brandon v. Nesbitt*, 6 T. R. 23; *Le Bret v. Papillon*, 4 East, 502.

7. PIE v. COOPER. H. T. 1704-5. K. B. 2 Ld. Raym. 1243. S. P. ANON. T. T. 1692. K. B. Comb. 212. S. P. GEORGE v. POWELL. T. T. 1704. K. B. Forst. 221.

A plea of alien enemy in abatement need not state any venue.
Action on the case, plea in abatement that the plaintiff was an alien enemy, but no venue; demurrer to plea.

Per Cur. This is well pleaded. The plaintiff might have replied that he was born in England generally. If such a defence is pleaded in bar it must be pleaded with a venue, and the plaintiff should then reply that he was born in a particular place in England. Judgment, *quod billa cassetur*.

See 2 Lord Raym. 853, 1014, 1173; 7 T. R. 243; 1 Saund. 8; 1 Bac. Ab. tit. Abatement, P.

[12]

(f) *Attainted.*

BISSE v. HARCOURT. H. T. 1690. K. B. 1 Show. 150; 1 Salk. 177; S. C. 3 Mod. 281; S. C. Carth. 137.

Attainder of plaintiff may be pleaded in abatement.
In *indebitatus assumpsit*, the defendant, to show the plaintiff's incapacity to maintain the action, pleaded an attainder of high treason, which was adjudged good on demurrer.

See Com. Dig. Abatement, E; and the Form, 1 Went. 75; 3 id. 115, 117; Bro. V. M. 252; and 2 B. & A. 258.

(g) *An outlaw.*—See tit. Outlawry.

1. *FORD v. EDGECOMBE*. M. T. 1698. C. P. 2 Lutw. 1529.

In an action of trover, the defendant pleaded in abatement outlawry of the plaintiff after judgment. The plea was admitted to be valid.

See Co. Lit. 128. n; Gilb. 6; C. P. 166-7; 1 Com. Dig. Abatement, E. 2; 1 Bac. Ab. Abatement, B. 1. See Forms, Petersdorff's Index, 214; and 3 Inst. Cl. 23.

2. *DRAYCOTE v. CURZON*. H. T. 1698. C. P. 1 Lutw. 39.

In dower the tenant pleaded that the demandant was waived and concluded in abatement. On a demurrer to the replication it was contended, that although the outlawry might be erroneous, it could only be avoided by a writ that she is of error, or an averment on the outlawry roll by the party proceeded against, and not by plea in a collateral action, in which opinion the court concurred, and observed that the outlawry continued in force until reversed in a regular manner. See 1 Leon 87; 44 E. 3. 27. a; Doct. Pl. 399; Bac. Ab. Outlawry, D. E.

Or if a woman be demandant, or plaintiff, that she is waived.

Outlawry may be pleaded, although the proceedings therein are irregular.

Outlawry of the testator to an action brought by an executor is a good plea. Outlawry of one plaintiff is a plea to both.

3. *POWIS v. WILLIAMS*. 1697. C. P. 2 Lutw. 1601.

Declaration in assumpsit against the defendant for money had and received by the defendant to the use of the plaintiff's testator. Plea in abatement, that the testator was outlawed, with an averment of his identity.

Per Cur. The debt being forfeited to the king by the outlawry, the attorney-general might have sued for the recovery thereof. The disability of the deceased descends to his representatives.

4. *CLERKE v. SCROGGS*. M. T. 1699. C. P. 2 Lutw. 1510.

Action of covenant on a demise made to the defendant's testator by baron and feme. Plea, outlawry of the baron in a former suit.

See 2 H. 7. 8; Doct. pl. 64; 2 Cro. Eliz. 616; 1 Com. Dig. Abatement, E. 2. In this case it was said the defendant might plead the outlawry in bar to part, and in abatement to another part.

5. *ATKINS v. BAYLES*. M. T. 1678. C. P. 2 Mod. 267.

Information against a defendant as a justice of the peace for improperly refusing to grant his warrant. The defendant pleaded outlawry of the plaintiff, to which the latter demurred. First—It was urged in support of the demurrer that the king being interested in the cause, the attorney-general might proceed, notwithstanding the alleged disability. This argument was disallowed by the court.

See Cro. Eliz. 425; 1 Com. Dig. Abatement, E. 2; 3 Bac. Ab. 672.

Secondly—It was contended that the outlawry was not pleaded *sub pede sigilli*, *sed non allocatur*, for it need not be so pleaded, being in the same court. See Co. Lit. 1286; 1 Lutw. 40; id. 1514.

Thirdly—It was argued that it was not averred in the plea that the plaintiff was the same person who was outlawed. But to this objection it was answered that the "*prædictus*" made it certain, and established the identity. See 1 Lutw. 40.

Outlawry of the same court need not be shown *sub pede sigilli*. It must be either expressly averred or appear on the face of the plea that the party outlawed and the plaintiff are one and the same person.

6. *FERRER v. MILLER*. E. T. 1691. K. B. 1 Salk. 217.

Per Chief Justice Holt. If a party pleads outlawry he ought to plead it *sub pede sigilli*, and if it be not so pleaded the plaintiff may refuse to accept it, but if he once acquiesce by accepting the plea he cannot afterwards demur. See 1 T. R. 149; and 1 Tidd. 435-6. 7th edit.

7. *SNOVEL v. EVANS*. L. T. 1696. C. P. 1 Lutw. 36.

Assumpsit against two defendants, one of whom is outlawed, the other pleads that the defendant against whom the proceeding to outlawry has been had is misnamed. Demurrer and joinder. Judgment *quod respondeas ouster*. See 1 Com. Dig. Abatement, E. 2.

When one defendant is outlawed, the plaintiffs may declare against the other alone.

Outlawry may be pleaded in bar to part and in a demurrer to another part.

[13] Outlawry is a good plea to an information *qui tam*, &c. although the plaintiff sue for the king.

If outlawry in another court be not pleaded *sub pede sigilli*, the plaintiff should refuse to accept the plea, for he cannot demur.

If one defen

8. HAGE v. KINNES. M. T. 1680. C. P. 3 Lev. 29.

The plea must conclude with a *prout patet per recordum*.

The defendant pleaded the outlawry of the plaintiff, and concluded with a *hoc paratus est verificare*, instead of *prout patet recordum*. Judgment of respondeas ouster awarded.

See Com. Dig. Pleader, E. 29; Willes, 126; Say. 208. 301; Hob. 244; and Nowlan v. Geddes, 1 East, 634.

9. GAWN v. SURBY. M. T. 1603-4. K. B. 2 Show. 443; S. C. 1 Lutw. 5.

It cannot be pleaded after an imparlance.

In an action for assault and battery, the defendant, after an imparlance, pleaded the outlawry of the plaintiff, to which the plaintiff demurred, and judgment was given for him in the King's Bench. On a writ of error being brought into the Exchequer Chamber, the Court affirmed the judgment, observing that outlawry cannot be pleaded after an imparlance.

See 8. H. 6 pl. 33; 5 Hen. 6 pl. 36; 16 Ed. 4. pl. 4; 1 Leon. 205; 2 Rol. 59; Ra. Eent. 252; Herne's Pleader, 8; 1 Brownl. 15; 1 Lord. Raym. 117; 1 Com. Dig. Abatement, E. 2.

(h) *Under a premunire.*

[14] See Co. Litt. 129 b; 1 Com. Dig. Abatement, E. 7; 2 Harg. State Trials, 263; 1 Bulst. 199. 2 id. 299; 1 Hawk. P. C. 19.

(i) *Excommunicated.*

As the statutes 53 Geo. 3. c. 127. s. 1; 54 Geo. 3. c. 68. st. 3;* abolishes the sentence of excommunication, it will suffice to refer to the authorities instead of abridging the cases.

Bradley v. Glyne, 7 Lutw. 17. 19; Stanton v. Pierpont, 3 Lev. 208; Hempson v. Bell. id. 240; Jay v. Bond, 1 Vent. 224; 3 Keb. 17; and see 20 H. b. 25; 2 Bulst. 72 Co. Litt. 134; Cro. Eliz. 84. 212; Moore, 775; 8 Co. 69. a; 1 Bac. Ab. Abatement, B. 2, and Excommunication, D. Gilb. C. P. 202; 1 Com. Dig. Abatement, E. 7; *Precedents, Petersdorff's Index*, 131.

(j) *A popish recusant*—See Papist.

1. STURTON v. PIERPONT. H. T. 1679. C. P. 3 Lev. 208.

It may be pleaded in abatement that the plaintiff is a popish recusant convict; and one plaintiff being so is a bar to all, though the suit be brought by them in a representative capacity. The prayer of judgment should be *quod res penderi non debet* and not *judicium de brevi*.

Debt for rent by the plaintiff as executors. Defendant pleaded in abatement by *petit judicium de brevi*, &c. that one of the plaintiffs is a popish recusant convict, and therefore quasi excommunicatus by the stat. 3 Geo. 1. c. 5.

11. It was urged that this disability is one of the plaintiffs incapacitated the whole of them, notwithstanding they sued in the representative character of executor. *Sed Per Cur.* The plea is bad, for the objection ought not to have been pleaded in abatement by *petit judicium de brevi*, the writ not being abated thereby, but only suspended; the prayer ought to have been *suspenderi non debet*.

* Excommunication in all cases (except in definitive sentences or interlocutory decrees, having force of definitive sentences, and pronounced as spiritual censures for offences of ecclesiastical cognizances s. 2.) shall be discontinued in England and Ireland, and instead thereof the judge who ordered the citation or who made the decrees which have been disobeyed, or before whom the contempt is committed shall pronounce such persons contumacious, and signify the same within ten days to his Majesty in Chancery by *significavit* (see the forms thereof in Schedule A. in both acts Appendix.) The officers of Chancery shall then issue a *centumace capiendo*, (Schedule B. of both acts,) directed to the persons to whom writs *de excommunicato capiendo* have been heretofore directed, which shall be returnable in like manner, and subject to all the regulations of law applying to the writ *de excommunicato capiendo* (particularly the provisions of 5 Eliz. c. 23. in England;) and all sheriffs, gaolers, and other officers shall execute the same by taking and detaining the body of the person named in the writ, on whose appearance, obedience, or submission (as the case may be,) the ecclesiastical court shall pronounce him absolved, and make order as (in Schedule C. of both acts) for discharging him from custody, and such sheriff shall so discharge him on him paying the costs of such custody and contempt. 53 Geo. 3. c. 127. ss. 1 & 2. Eng.; and 54 Geo. 3. c. 61 ss. 1 & 2. Ire.

No person excommunicated (as in Sch. 2) shall incur any civil penalty, except six months' imprisonment or less, as directed by the court pronouncing such excommunication, in which such sentence and term of imprisonment shall be certified into Chancery, and thereupon the writ *de excommunicato capiendo* shall issue and the usual proceeding shall be had, the party shall be imprisoned for the term so directed, or till his absolution.—Schedule 3 of both acts.

See 1 Lutw. 19; 3 Lev. 333, 334; Com. Dig. Abatement, E. 7; 1 Bac. Ab. Papist, A. 1; Precedents, Lev. Ent. 11; Cliff, 3; 1 Brown, Ent. 5; [15] 1 Went. 29, 58, 61; and see the statutes 23 Eliz. c. 1; 35 Eliz. c. 1; 29 Eliz. c. 6; Jac. 1. c. 4; 8 Jac. 1. c. 4-5; 7 Jac. 1. c. 6; 25 Car. 2. c. 2; 16 Geo. 2. c. 30.

It is insufficient for the plea to state that he is a recusant, but it must allege that he is a popish recusant.

2. COUNTESS OF PORTLAND v. COLE, E. T. 1679, 3 Lev. 11.

Assumpsit for money had and received. The defendant pleaded in abatement that the plaintiff was a recusant convict. The plaintiff replied that the king had pardoned the conviction. Demurrer and joinder. It was contended that the plea was insufficient, because it did not aver that the plaintiff was a popish recusant. The objection being admitted to be valid by the Court judgment of *respondens ouster* was awarded.

3. RICAUT v. TOMLIN, T. T. 1680, 3 Lev. 66.

Assumpsit on an account stated. The defendant pleaded that the plaintiff being a popish recusant, was indicted for that offence and convicted, according to the statute in such case made and provided, and concluded the plea *proul patet per recordum*. Demurrer to plea and joinder. It was argued in support of the demurrer, and in which the Court concurred, that it ought to have been alleged in the indictment that the plaintiff was a popish recusant and convicted of popish recusancy. But as it was stated in the plea that the plaintiff being papalis recusans was indicted, and that the conviction consequent thereon was according to the statute, it was a sufficient allegation of the recusancy, and that he was papalis recusans convictus de papalis recusantia and the plea was adjudged good.

The plea must show that the party was convicted and that the conviction was secundum formam statuti.

4. MOORE v. —, M. T. 1737, C. P. 1 Com. Rep. 307.

The defendant in this case pleaded that the plaintiff was summoned to appear at a particular day and place to take the oaths before a justice of the peace; that he then made default, and the justice certified to the quarter sessions that he was duly summoned, and that his omission to attend was recorded, *proul patet per recordum*, &c. and that he did not afterwards take the oaths, either at the same sessions or elsewhere, concluding with a verification. Demurrer to plea and joinder.

And conclude with a verification by the record.

Per Cur. The defendant must answer over. The plea states that the plaintiff was duly summoned and made default, which default was recorded *proul per recordum*, &c. and then alleges as matter in pais that he did not take the oaths at the quarter sessions, or afterwards, &c. *hoc parat est verificare*, without offering to verify it by the record, whereas there is no conviction till the refusal of the oaths at the sessions, for if he had not appeared before the justices who summoned him, but had afterwards appeared and taken the oaths at the sessions, he could not have been convicted, and therefore it ought to have been stated that he was convict *proul patet per recordum*, &c. *hoc parat est verificare per recordum*. See 8 Mod. 43.

5. LORD PETRE v. THE UNIVERSITY OF CAMBRIDGE, T. T. 1691, C. P. 3 Lev. 332; 2 Lutw. 1117, 1120; S. C.

Quare impedit for the recovery of a church; plea popish recusancy; replication, that the king inter alia pardoned all judgments and convictions for not coming to church, and produced an exemplification out of Chancery. Demurrer to replication and joinder.

The plaintiff may reply that the conviction is pardoned.

Per Cur. The pardon not only discharged the conviction, but also restored the party to his ability to sue.

[16]

See 1 Com. Dig. Abatement, E. 7; Bac. Ab. Papist, A. 1.

(k) *A feme covert.*

1. BARCELOT v. BURTON, E. T. 1686, 1 Lutw. 22.

Declaration in assumpsit for goods sold; plea, coverture of plaintiff in abatement; replication, that it is pleaded after an imparlance. Judgment, *respondens ouster*, for having been pleaded too late; and see note to Pennon v. Hul-

Coverture of plaintiff when she sues with out her husband must be pleaded in abatement.

* 1 Geo. 1, stat. 2. c. 18. s. 11.

ri, 9 Lutw. 1641, where it is said that coverture must always be pleaded in abatement.

See observations upon this case, 3 T. R. 630, 631; and generally 2 H. 4. 7. a; Co. H. 6. 11; 32 Ent. 173; Doct. Pl. 3; 1 Sid. 410; Co. Lit. 1526; Moore, 851; 1 Com. Dig. Abatement, E. 6; H. 42; Lee v. Maddox, 1 Leon, 169; 2 Lord Raym. 1525; 2 Stra. 811; Carth. 124; 1 Show, 50; 1 B. & P. 338, 357; 5 T. R. 679; 8 id. 545; Lofft. 142; 2 B. & P. 226; 3 Campb. 123; 9 East, 471; 11 East. 471; 11 East, 301; Precedents, Petersdorff's Index, 101.

2. MILNER V. MILNER, E. T. 1790, K. B. 3 T. R. 627.

In an action of tort for an injury done to a personal chattel of the wife *dem sole*, advantage of her coverture if she sues alone must be taken by plea in abatement.

This was an action of trespass, brought by a *feme covert* without her husband, for an injury done to a personal chattel of the wife, *dem sole*, to which the coverture of the plaintiff at the time of exhibiting the bill was pleaded in bar. Demurrer and joinder. In support of the demurrer it was contended, that although the husband ought to have been joined in the action, yet the only regular method by which the defendant could have availed himself of the omission would have been by plea in abatement, because the objection arising from his not having been joined, goes not to the cause of action, but merely to the disability of the party suing.

(See 32 H. c. 11; Co. Ent. 173; Rast. Ent. 108, 161, 126; Doct. pl. 3; 1 Sid. 410; 1 Leon. 168, 169; 2 Lord Raym. 1525; 2 Stra. 811; 2 Rol. Rep. 23.)

On the other side it was argued, that though the defendant might have pleaded the coverture in abatement, it might also be pleaded in bar.

Per Cur. The defendant by his plea imputes to one of the plaintiffs a personal defect. Such disabilities should be taken advantage of by plea in abatement. The proposition is clearly laid down (Com. Dig. Pleader, 2 A. 1.) and now well established, that coverture in a woman, when either plaintiff or defendant, must be pleaded in abatement. Judgment for plaintiff.

See 1 Com. Dig. Abatement, E. 6; 1 Chit. Pl. 437, 3d edit.

3. MORGAN V. PAINTER, E. T. 1795, K. B. 6 T. R. 265.

[17]
Coverture after the commencement of the suit cannot be made the ground of nonsuit.

In an action of assumpsit the plaintiff at the trial was nonsuited, it being proved that she was a *feme covert*; but on its being shown by affidavit, on motion to set aside the nonsuit, that she was not married till after the writ was issued, the rule to set it aside was made absolute, as such defence could not be made available under the general issue. See *Le Bret v. Papillon*, 4 East, 502.

(B) OF THE DEFENDANT.

(a) Coverture.

1. BARCELOT V. BURTON, E. T. 1686, 1 Lutw. 23.

Indebitatus assumpsit for goods sold; plea, coverture in abatement. Judgment, *respondeas ouster*, because it was pleaded after an imparlance.

See 12 Ed. 3. 18, b; 18 Ed. 4. 4; 2 Rol. Ab. 3; Style, 280; 1 Bac. Abatement, G; id. Baron and Feme, L; 1 Com. Dig. Abatement, F. 2; Cro. Eliz. 554; Carth. 124; 1 Salk. 7; S. C. 6 Mod. 225, 311; 3 T. R. 627; 4 Esp. 27; 11 East, 301; 3 T. R. 545; 1 B. & P. 338; 3 Campb. 123; 4 id. 26; 1 T. R. 83.

2. HETHERINGTON V. REYNOLDS, M. T. 1706-7, K. B. 1 Salk. 8.

The defendant being sued in the Marshalsea Court as a *feme sole*, after having appeared and pleaded to the action, married, and the cause was then re-

If a married woman be sued with out her husband she may plead her coverture in a bar, but the action were originally commenced in an inferior court while the defendant was *sole*, and removed.

* And no advantage of the coverture can be taken if the marriage take place after judgment; 11 H. 4. 4². h; 21 Edw. 4. 73. 87, or even after verdict, and before the day in bank 4. H. 4. 1; 1 Sid. 143; but judgment under such circumstances, should be entered up in the name of the *feme sole*, and then revived by *scire facias* in the names of the husband and wife before execution. See 2 Saund. 72 k; 6 Bac. Ab. *scire facias*, C. 6; and post, Baron and Feme; Executor; Parties to Actions; *Scire Facias*.

† But coverture, at the time when the supposed contract was entered into may be pleaded in bar, or given in evidence under the general issue. 12 Mod. 101; 5 T. R. 545; 3 Campb. 232; 3 Campb. 438; Bul. N. P. 172.

moved by *habeas corpus* into King's Bench. The plaintiff declared against her in the King's Bench, as in the custody of the Marshal; the defendant pleaded in abatement that she was married when the *habeas corpus* was issued.

Per Cur. The plea in this case is valid, for the proceedings are *de novo*, and the Court takes no notice of the proceedings in the court below, or of what court is antecedes the *habeas*, but the practice in such cases is on the return of the *habeas* on motion to grant a *procedendo*.

3. HADDOCK v. HOWARD. H. T. 1747. C. P. Barnes, 355.

A *feme sole* was arrested in an inferior court, and a few days afterwards married. The cause was removed into this court by a *habeas corpus*, and the defendant then pleaded her coverture in abatement, Rule absolute to set aside the plea. In this case the preceding decision in Hetherington v. Reynolds, *supra*, was not cited.

4. MATHER'S CASE. T. T. 1696. K. B. Comb. 449. S. P. ANON. Loft. 27. [18]

Per Cur. If an original be filed against a *feme sole*, and she marries before the return thereof, the plaintiff may declare against her without joining her husband, for her intermarriage is no abatement of the writ. See 1 Com. Dig. Abatement, F. 2; Cro. Eliza. 554; Bac. Ab. Abatement, G.

5. KING v. JONES. T. T. 1728. 2 Stra. 811; 2 Ld. Raym. 1525. S. C.; 1 Barnard, 70, S. C.

The plaintiff in error, on a judgment recovered against his wife, assigned for error that she had appeared and pleaded as a *feme sole*, whereas she was married at the time of her appearance and plea. The defendant in error pleaded by way of estoppel, that the plaintiff in error and one J. K. became bail for her as a *feme sole*, and prayed that they should not be admitted to aver matters inconsistent with the record to which the plaintiff in error and his wife demurred.

Per Cur. This is to abate the plaintiff's writ by the act of the defendant, which was never allowed. We must take it, that at the time of bringing the action the defendant was a *feme sole*, because no attempt is made to carry it back further than the appearance. Plaintiff would be in a fine condition if, after they have arrested a woman, she shall be allowed to overthrow their proceedings by a subsequent marriage. Judgment affirmed. See 1 Roll. Ab. 759.

6. VESEY v. SMITH. E. T. 1700. K. B. 12 Mod. 503.

Assumpsit for goods sold; plea of coverture at the time the action was brought in abatement, but no venue was stated; replication, that the defendant was sole and not covert, concluding to the country.

Per Cur. Such a plea needs no venue; it may be tried where the writ is brought; but if pleaded in bar, there must be a replication, and that must show the place of the party's birth in England, from whence a venue may arise; and though there are precedents both ways, yet this is a true difference, and the defendant must show and prove the coverture; and saying in the replication that she was sole, implies the negative of a marriage, as much as that she was not covert. If the plea had been in bar, the marriage must have been laid at a certain time and place; but being in abatement it is good, though laid generally; but the husband's name ought to be shown, that the plaintiff may know against whom to proceed. See 1 Saund. 21; Ast. Ent. 9, 10; Bac. Ab. Abatement, S; 7 T. R. 243. The form of the plea in 1 Lutw. 23 is bad. See 2 Saund. 209, c; Lil. Ent. 1; 2 Rich. C. P. 1.

7. RAINE v. SPENCER. M. T. 1735. C. P. Barnes, 334.

Defendant pleaded coverture, as the wife of John Thompson, in the following form; "And the aforesaid Sarah Spencer," &c. Her affidavit was entitled in the same manner, but signed Sarah Thompson. Plea set aside.

III. TO THE COUNT OR DECLARATION.

1. CHETHAM v. HEIGH. T. T. 1681. 8 Lev. 67; S. C. Carth. 45; S. C. 1 Lutw. 851, 866; S. C. 1 Show. 20.

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the inferior
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Contra.

But if a
feme sole
marry after
a writ is is
sued but be
fore the re
turn thereof
it does not
abate.

Or at any
other stage
of the
cause.

A plea of
coverture in
abatement
is good, al
though it
has no ve
nue; but
the name
of the hus
band must
be stated.

A plea that
the afore
said S.
Spencer,
&c. styling
herself wife
of J.
Thompson,
and an affi
davit as S.
Spencer
signed S.
Thompson,
is irregular.

[19]
A tenant
may plead
in abate
ment to
the count,
that the

same thing is demand ed twice, as if the de mand be of a manor and land which is parcel of it. In such a plea the ten ant should distinguish those lands which are twice de manded from the other lands demanded.

gardin, 200 acris terræ, 100 acris prati, 100 acris pastur, 500 acris bosc' & 200 acris Jampner & Bruer, cum pertinen' in Etwal & Eggington. The tenant comes and defends jus suum quanda, &c. and says, 6 mess. 10 acris terræ, 10 acris prati, & 20 acris pastor', cum pertinen' parcell' tenementor in Etwall superius peitt, are, and time out of mind have been, parcel maner' de Etwall prædict' unde ex quo sunt bis petit judic' de brevi. Demandant demurs, and upon argument and view of precedents the plea was abjudged ill; for where it is said that the messuages, &c. are parcel tenementorum prædict, that may well be parcel of the manor, and demanded as parcel of the manor, ultra & præter the 35 messuages, &c. and a plea in abatement ought to be certain to every intent. To have made this a good plea, he should have said, that the 6 messuages, parcel of the 35 messuages, are parcel of the manor, and then they would appear to be *bis petita*; but the 6 messuages may be parcel of the manor, for the manor may comprehend 100 messuages, &c. and the 35 messuages, &c. are not demanded as parcel of the manor, but ultra & præter the manor.

See 1 Com. Dig. Abatement, G. 2; 2 Rol. Rep. 482; 1 Burr. 626, 630.

2. MARSHAL V. BURNET. H. T. 1684. C. P. 1 Lutw. 13.

Action of assumpsit against an executrix, who, after craving oyer of the writ pleaded that the testator was alive at the time of the writ purchased, but no venue was annexed to the averment that the testator was then alive. Judgment of *respondeas ouster* awarded.

As to the principal point, see 1 Dy. 17, a. 1; 6 Lutw. 15; Hob. 199, 245; 2 Lev. 197; 1 Com. Dig. Abatement, G. 6; Precedents, Petersdorff's Index, 134; Her. Prec. 1.

3. BRAGG V. DIGBY. E. T. 1697. K. B. 2 Salk. 658. VANDERPLANK V. BANKS. H. T. 1759. P. 2 Wils. 85, 395. MURRAY V. HUBBART. H. T. 1797. C. P. 1 B. & P. 645.

In an action of assumpsit by original, the defendant, without craving oyer of the writ, pleaded a variance between the writ and count, to which the plaintiff demurred. It was adjudged that he ought to have demanded oyer of the writ before he attempted to take advantage of the variance, because, though the writ is in the count, yet being not upon the same roll with the count, the defendant cannot plead to it without first obtaining oyer. Judgment of *respondeas ouster*.

See 2 Lutw. 1181; Cro. Eliz. 829; 4 Mod. 246; 6 id. 303; 2 Salk. 658, 701; 1 Vent. 154; 1 Saund. 118; Andrews, 76; Gray v. Sedneff, 3 B. & P. 395; 7 East, 384; 2 N. R. 188; 1 Com. Dig. Abatement, G. 8; 1 Chit. Pl. 430, 3d ed; 1 Bac. Ab. Abatement, H. 1.

4. BOATS V. EDWARDS. T. T. 1779. K. B. 1 Doug. 226. S. P. FORD V. BURHAM. T. T. 1737. C. P. Barnes 340.

On a rule to show cause why the interlocutory judgment which had been signed for the plaintiff should not be set aside for irregularity, it appeared that the defendant had craved oyer of the original, which the plaintiff had taken no notice of, but had signed judgment for want of a plea.

Lord Mansfield desired the bar to take notice, that the practice for defendants to pray oyer of the original, which is so often used for delay, is not warranted by any rule or principle of justice; that it is incumbent on the Court to make their proceedings as little dilatory, oppressive, and expensive,

* It is for this reason that a variance between the original writ and the count or declaration is no longer pleadable; and if it be pleaded, the plaintiff may sign judgment, or move the Court to set it aside, 1 B. & P. 646-7; 8 id. 395; 7 East, 388; 2 N. R. 188; 5 Taunt. 655. n; or in bailable cases the Court will discharge the defendant on entering a common appearance, Spalding v. Moore, 6 T. R. 362; see 1 Chit. Rep. 281; 4 East, 589; 1 Bing. 266; 2 N. R. 98; 7 Taunt. 458; 8 T. R. 416; 6 B. Moore, 66; 3 B. & A. 4; Petersdorff on Bail, 416. And they will not, on the ground of a variance between the writ and count, set aside the proceedings; for that would be permitting the defendant to do indirectly what the practice of the Court will not allow him to do directly, by craving oyer of the original writ, and pending the variance in abatement. Hole v. French, 2 Wils. 392; but see 5 T. R. 722; 4 East, 589.

[20]
Oyer of the writ will not now be granted.*

as possible; that it is unnecessary for the defendant to see the original after he is informed of the cause of action and declaration; that the Court of Common Pleas has rejected the practice; and that, from henceforth, plaintiffs in this Court may proceed as if such demand of oyer had not been made. See 6 T. R. 364; 7 East, 383; 3 B. & P. 395.

IV. TO THE WRIT.

(B) TO THE ACTION OF THE WRIT.

(a) *That it is prematurely brought.*

1. PAPWORTH v. STACY. T. T. 1685. C. P. 1 Lutw. 16 S. P. PICKERING v. SIMOND. E. T. 1731, K. B. Fort. 334.

In debt on bond against an executor the defendant craved oyer of the original, and pleaded that her testator was alive at the time of the original purchased. The plea was defective in point of form, but judgment quod breve cassetur was given, it appearing that the writ bore date before the money became due.

See Hob. 198. 199. 245; 2 Lev. 197; Bends. Pl. 93; Lutw. 8. 14. 15; 1 Com. Dig. tit. Abatement, G. 6; id. tit. Action, E. Foster, 334; Precedents, Clift. Ent. 10; 3 Inst. Cl. 56; Anst. Ent. 7; 1 Went. 55. 65.

2. OWEN v. BUTLER T. T. 1699. K. B. Ld. Raym. 345; S. C. Comb. 434.

In an action of debt on bond, the condition upon oyer appeared to be, that the defendant should pay certain specified sums of money by three instalments; the defendant pleaded in abatement that he had paid the money due on the two first days, and that the third instalment was not yet due. Demurrer to plea; in arguing which it was contended that this was matter in bar, and not in abatement; and in this opinion Lord Holt concurred, observing, that if a man pleaded that the plaintiff may have another action, defendant cannot plead that the suit is prematurely brought. [21]

3. FACQUIRE v. KYNASTON. E. T. 1706. K. B. 2 Ld. Raym. 1249.

Action of assumpsit; the defendant pleaded in abatement that the promises in the declaration were made tiel jour, which was after the commencement of the action, and traversed that they were made before, to which the plaintiff demurred. It was argued, that though the matter was pleaded in bar, yet that many things that might be pleaded in bar might also be pleaded in abatement. *Sed Per Cur.* The defendant should have pleaded the general issue, non assumpsit, under which he might have given these facts in evidence. The defendant must answer over.

(b) *That the remedy is misconceived.*

See 1 Com. Dig. tit. Abatement, G. 5; post, tit. Action;† and Precedents, 3 Inst. Cl. 120; 1 Went. 71.

(c) *Auter action pendent.*

1. BOWLER v. SPATHURST. E. T. 1695. 1 Lutw. 31.

To an action of assumpsit the defendant pleaded another pending for the same cause, and that a writ had been previously sued out, directed to the sheriff of W.; replication, confessing the prior writ, but alleging that no proceedings were taken thereon, and that another writ of the same date was sued out, directed to the sheriff of S. to which defendant had appeared. Demurrer thereto and joinder in demurrer.

Per Cur. The replication, is bad because the action is laid in M.; and the plaintiff, by his replicant, has confessed that the writ to which the defendant appeared, and on which the plaintiff has declared was directed to the sheriff of S., which is totally inconsistent, so that the present declaration is qu.; *vide* supposed to be founded on a writ directed to the sheriff of W. and not to the

The defendant may plead in a batement that the action is brought before the day appointed for payment. *Semb.* overruled, *vide infra.* As a plea in abatement ought to show that the plaintiff may have another action, defendant cannot plead that the suit is prematurely brought. [21] In an action of assumpsit the defendant cannot plead in a batement that the promise was made after the commencement of the action and not before.*

A defendant may plead in a batement that there is another action depending for the same cause *Sed post.*

* As these matters are ground of demurrer or nonsuit, see 2 Saund. 210. a. or for a special motion to the Court, 2 Chit. Rep. 11. it is now very unusual to plead them.

† The objection to the action, that the remedy is misconceived, is never at present made the subject of a plea in abatement, but the defendant may take advantage of it at the trial; or if the mistake appear upon the face of the declaration, he may demur generally, move in arrest of judgment, or bring a writ of error.

[22]
Though it has been held that a plea in abatement that another action is pending in the Common Pleas for the same cause, is bad. The pendency of a prior action in an inferior court can not be pleaded to an action in a superior one. Or a replevin in pending in the county court can not be pleaded to an action in the Common Pleas. To an action against two a plea by both that another action is pending against one for the same cause is valid.

[23]
But *semb.* in trespass against 3 it cannot be pleaded that there was another action pending against two of them for the same cause; *vide infra.*
In debt on bond against a band and wife, the wife being

sheriff of S.; and then by the allegation that the appearance of the defendant was on a writ directed to the sheriff of S. he has, of his own showing falsified his writ. Judgment that the writ should abate. See 14 H. 7. 126; 5 Co. 615; 5 Co. 62. n; Hob. 137; Doct. Pl. 10; Lev. Ent. 25; 1 Com. Dig. Abatement, H; 1 Bac. Ab. Abatement, M; Precedents, Petersdorff's Index, 39.
2. *BONNER V. HALL.* E. T. 1696. K. B. 1 Ld. Raym. 338; S. C. Carth. 435; S. C. Holt, 557; Comb. 179. S. C.

In assumpsit the defendant pleaded in abatement another action pending in the Common Pleas for the same cause; replication, that no action was pending for the same cause, and therefore petit judicium de debito et damnis, to which the defendant demurred, and joinder in demurrer.

Per Cur. In this case the first fault is in the defendant, as the plea itself is ill; and as he cannot plead in this court, the pendency of prior suit in the Common Pleas, the defendant must answer over. See 5 Co. 6. 2. a. *semb. contra*; 3 Mod 181; 1 Salk. 177; Moore, 629; Co. Ent. 1682; Ra. Ent. 681; 2 Sayer, 6

3. *BRINSBY V. GOLE.* M. T. 1679. K. B. 12 Mod. 204. *SEERS V. TURNER.* H. T. 1703. K. B. 2 Lord Raym. 1102. S. P.

Indebitatus assumpsit. The defendant pleaded another action dependant in the Sheriff of London's Court for the same cause, and held to be no plea because an action pending in an inferior court is no bar to an action in a superior court for the same cause.* See Bro. tit. Brief, pl. 107. 560. 624; Dy. 92. 93; Fitzg. 313. 314; 1 Bac. A. Abatement, M; Com. Dig. Abatement. H. 22.

4. *WHITE V. WILLIS.* E. T. 1759. C. P. 2 Wils. 87.

Trespass for taking the plaintiff's cattle. The defendant pleaded in bar that he distrained for rent, and that the plaintiff levied a plaint in replevin before the sheriff of the county, and that the same is still pending in the county court. Demurrer and joinder.

In support of the demurrer it was contended that the defendant could not plead in the Court of Common Pleas a suit depending in an inferior court in which opinion the Court concurred, but gave the defendant permission to withdraw his plea and plead de novo, upon payment of costs to the plaintiff.

5. *RAWLINSON V. ORIETT AND ANOTHER.* E. T. 1683. K. B. Carth. 96; S. C. Comb. 144; S. C. Holt, 1; S. C. 1 Show. 75.

Trespass against two defendants, who both pleaded in abatement that the plaintiff had brought another action against one of them for the same trespass. Demurrer to plea. *Per Cur.* This is a good plea, and will abate the whole action; the objection that it will only afford a defence to one, and not to both, of the defendants, is ill founded. See Hob. 137. 250; Winch. Ent. 892. 893; 1 Mod. 239; Lutw. 42; Cro. Eliz. 202; 1 Brownl. 161.

6. *WALLIS V. SAVIL, NAYLOR, AND STACY.* H. T. 1700. C. P. 1 Lutw. 41.

The plaintiff declared against the defendants in an action of trespass, to which they pleaded as to part not guilty, and to the residue that the plaintiff had in a preceding term impleaded Savil and Stacy, and several others therein named, omitting Naylor's name altogether. Judgment gas given for the plaintiff. 1 Com. Dig. Abatement. H. 24; Bac. Ab. Abatement, M.

7. *HAIGHT V. LANGHAM.* E. T. 1690. C. P. 3 Lev. 303.

In debt on bond against husband and wife, it appeared that the wife was the heir of B. Plea in abatement autre action pendent, against the husband and others as executors of B.; to which the plaintiff demurred.

Per Cur. Where an action is brought against one person as an heir, and against another as executor, and the plaintiff recovers two judgments, and after he has levied the debt upon one of them he endeavours to levy it again on the other, he shall be aided by audita querela; because he could not have pleaded it in abatement. Judgment, respondeas ouster.

See H. 6. 14; Cro. Eliz. 207; 14 Vin. Ab. 264; 11 Viner. Ab. 249. heir of B. they pleaded in abatement another action pending against the others as executors of B.; the Court ordered that defendant should answer over.

* *See quære*, if it were alleged that the inferior court had jurisdiction. Fitzgibbon, 814,

8. **KNIGHT'S CASE**, T. T. 1702. 2 Lord Raym. 1014; 1 Salk. 329; 3 id. 238; Holt, 255.

Defendant pleaded a misnomer in abatement. The plaintiff, without discontinuing, declared against him *de novo* by his right name, and he then pleaded *auter action pendent*.

Per Cur. It is too late now to discontinue, for a discontinuance only relates to the time of its being entered upon the record, so that if the plaintiff should now enter it and reply nul tiel record, it would be against him, because it was a record at the time of plea pleaded. See Doc. Pl. 67. 68.

9. **JAMES V. MATTHEWS**, E. T. 1707. C. P. 1 Com. Rep. 167.

In an action of trespass the defendant demanded oyer of the original, and in the original there appeared a fault in the addition of the defendant, which he availed himself of by plea in abatement. The plaintiff replied, and showed another original, and concluded with a traverse *absque hoc*, that the action was founded on the other original, upon which the defendant demurred. Judgment for the defendant.

10. **HUTCHINSON V. THOMAS**, T. T. 1674. K. B. 2 Lev. 141; 3 Keb. 136. 426. 491. **S. C. JACKSON V. GISLING**, 2 Stra. 1169. S. P.

An information for usury was entitled as of Michaelmas Term. The defendant pleaded that another person had in the same term exhibited an information against him for the same usury, and obtained judgment. Demurrer to plea, because both the informations as pleaded refer to the first day of the same term, instead of its being shown on which particular day in the term the first and second information were exhibited. Judgment for plaintiff.

11. **PRYNN V. EDWARDS**, T. T. 1694. 1 Ld. Raym. 47; 3 Salk. 145. S. C.

Debt upon a judgment. Defendant pleads in abatement that a writ of error is depending, and concludes *quod erit inde sine die quousque*, &c. Demurrer to plea, and joinder. Judgment for plaintiff, because the defendant ought to have concluded *quod breve cassetur*.

12. **BAINES V. BLACKBUR**, E. T. 1755. Sayer Rep. 216.

In an action of debt brought for exercising a trade contrary to the 5 Eliz. c. 4. the defendant pleaded in abatement that a prior action was depending for the same matter. Upon a demurrer to this plea it was holden to be bad.

And by the Court—The pendency of a prior action for the same matter may be pleaded in bar to a second action, but it cannot be pleaded in abatement. In general the pendency of a former suit must be pleaded in abatement, yet in a penal action at the suit of a common informer, the priority of a pending suit for the same penalty in the name of a third person may be pleaded in bar.

13. **THEOBALD V. LONG**, T. T. 1697. K. B. Carth. 453.

The defendant in this action pleaded in abatement another action depending in the same court for the same cause of action; and the counsel for the plaintiff having craved oyer of the record in the prior suit; now moved for a rule that unless the defendant gave oyer of it on the next day, that final judgment might be signed: *Et Per Cur.* When a record of the same court is pleaded in abatement, and the plaintiff demands oyer of that record, and it is not given him in convenient time, the plea ought not to be received, but the plaintiff may sign judgment; and a rule was made that unless the defendant gave oyer of the record the next day, judgment should be given for the plaintiff. *Creames v. Wichatt*, H. T. K. B. Calth. 517. S. P. See *Keilw.* 95, 96; *Dy.* 227, 228.

14. **COMBE V. PITT**, T. T. 1673. K. B. 3 Burr. 1423; S. C. 1 Bla. 437. 523.

A plea in abatement to debt against the defendant, for unlawfully corrupting three several persons, &c. to which defendant pleaded in abatement that in the same term one G. L. had exhibited his bill against the said defendant of a plea of debt for the same cause of action, and for the very same offences. Replication, that after committing the offences in the bill mentioned, and long before the ex-

* But oyer of a record cannot now be demanded. See 1 Lord Raym. 250. 347; *Doug.* 476; 1 T. R. 149; and *ante*, 20. as to oyer of an original writ.

A suit to which a misnomer has been pleaded exists until regularly discontinued; hence the pendency of such an action may be pleaded in abatement. Nor can the effect of a plea in abatement be avoided by another writ. When two suits are commenced in the same term, the plea should show the precise day or time when the prior suit was commenced. The plea must conclude *quod breve cassetur*, and not *quod erit inde sine die quousque*. Although in general the pendency of a former suit must be pleaded in abatement, yet in a penal action at the suit of a common informer, the priority of a pending suit for the same penalty in the name of a third person may be pleaded in bar.

[24]

When another action is pending is pleaded, the defendant must grant record with in a convenient time after it is demanded.

show that the right of action was attached in the other suit before the commencement of the plaintiff's action.

hibiting G. L.'s bill, viz. on the 30th of June, 1761, the plaintiff sued forth a writ of latitat against the defendant, returnable on Saturday next after the morrow of All Souls; and that the defendant, before the return of such writ, to wit, on the 29th of July following, was duly served with a copy thereof; and that the defendant afterwards, at the return thereof, being on Saturday next after the morrow of All Souls, appeared thereunto; and therefore the said defendant, in Michaelmas Term, viz. on Saturday next after the morrow of All Souls, exhibited his bill against the said defendant for recovery of the said debt; and this, &c. wherefore, &c.

[25]

Rejoinder: that after the committing of the said supposed offences in plaintiff's bill mentioned, and long before the day of exhibiting the respective bills of the said plaintiff and G. L. viz. on the 30th of June, 1761, the said G. L. sued out a latitat against the said defendant, returnable on Saturday next after the morrow of All Souls; and that afterwards, and before the return of the said writ, and before the defendant was served with a copy of the said writ at the suit of the above plaintiff, or knew any thing thereof, viz. on the 7th July, 2 Geo. 3. he was served with a copy of a writ at the suit of the said plaintiff; and in obedience thereto the said defendant, on Saturday next after the morrow of All Souls, appeared to the writ of the said G. L.; and thereupon in Michaelmas Term, to wit, on Saturday next after the morrow of All Souls last past, the said G. L. exhibited his bill against the said defendant for the recovery of the supposed debt by him demanded as aforesaid. And this, &c. wherefore, &c.

Surrejoinder. that by the practice of the Court, latitats sued out after the end of any term tested of the term preceding; that the writ of latitat alleged to have been sued out by the said G. L. though tested the 30th June, 1761, being the last day of Trinity term, was really and in fact sued out on the 3d day of July, in the same year, and not before; and that the writ of latitat of the said plaintiff, tested the 30th of June aforesaid, was really and in fact sued out by the said plaintiff against the said defendant for the cause aforesaid, long before the writ of latitat in the said rejoinder mentioned, was really and truly sued out by the said G. L., to wit, on the 1st day of July, 2 Geo. 3. to wit; at Ivelchester; and that the said plaintiff, the same day and year in the replication mentioned, did serve a copy of the said writ on the said defendant; and on his appearance thereto exhibited his bill and declared against him as aforesaid. And this, &c. wherefore, &c. To this surrejoinder the defendant demurred, specially assigning for cause that the surrejoinder does not support the replication; but it is a departure therefrom, to wit, that by the said replication the plaintiff, in order to maintain a priority of suit, pleaded that he sued out a writ of latitat against the defendant on the 30th of June, 1761, yet by his surrejoinder he insisted that the writ of latitat was sued out at a different time, viz. 1st July, 1761, and also that the plaintiff has not traversed or denied the service of the writ sued out by the said G. L. to be before the service of the writ sued out by the said plaintiff, as the said defendant has in his rejoinder alleged, and the said surrejoinder, &c. The defendant joins in demurrer.

[26] *Per Cur.* If the plea itself is bad, it is unnecessary to go into any of the pleadings subsequent to the plea; and we are all of opinion that it is untenable. It is a plea in abatement, showing "that another action was brought against the defendant in the same term by another person for the same offence;" and this is all, without any thing more being stated; whereas the defendant ought to have shown "that the right action was attached in some other person before the present plaintiff's action was commenced;" for notwithstanding the general fiction "of the whole term being but one day," yet when the priority of action becomes essential and necessary to be ascertained, the particular day must be shown. A distinction has been taken between pleas in bar and pleas in abatement, viz. that pleas in bar must show the priority, because the right of action attaches by the priority; but that where both actions are brought at the same time it ought to be, as it is here, pleaded in abatement, and that such a plea in abatement is good. But there can be no reason or foundation for such a distinction, for in both cases it is equally necessary to

set out the particular day. If the particular day be not specified, the whole term will be considered but as one day. A case was cited from Moore. 864, and Hobart, 128, *Pye v. Cook*, to prove that where two informations are exhibited on the very same day, the defendant needs not answer either, and that one may be pleaded to the other. But though the law does not in general allow of the fraction of a day, yet it admits it in cases where it is necessary to distinguish; and we do not see why the very hour may not be so too where it is necessary, and can be done, (as for instance in the register's office, where they always mark the hours); for it is not like a mathematical point, which cannot be divided; however, this is not necessary to be determined in the present case. Upon the whole, the plea is bad; and therefore there is no need to examine any of the subsequent pleadings. Our judgment is, that the defendant *respondet ouster*. See 3 T. R. 361; Hob. 128; Moore, 863; 2 Lev. 148; Carth. 234; Stra. 24.

(d) *Writ of Error pending*.—See tit. Error, Writ of.

1. COURTNEY'S CASE, H. T. 1701, K. B. 7 Mod. 140.

Debt was brought upon a judgment in the Common Pleas, pending a writ of error, and that matter pleaded in abatement.

Per Cur. It is hard that a writ of error should supersede execution upon a judgment and not supersede an action to be brought thereupon; for though the action is commenced with a new original, yet it is not upon a collateral matter. The judgment upon which the writ of error is brought is the gist of the action.

2. PRINN v. EDWARDS, T. T. 1694, 3 Salk. 145; 1 Lord Raym. 47.

Debt upon a judgment, the defendant pleaded a writ of error depending in the Exchequer Chamber, and concluded *erit inde sine die quousque*: Adjudged an ill plea, because no re-summons lies in this case. See Skin, 590.

3. GOODWIN v. GODWIN, H. T. 1709, K. B. 10 Mod. 16. INNS v. HUMPHREYS, T. T. 1691, K. B. Comb. 199.

In this case the question was whether an action of debt upon a judgment could be brought in the King's Bench, pending a writ of error in the Exchequer Chamber. The Court, though they determined that the writ of error was not pleadable in bar, yet doubted whether it might not be pleaded in abatement.

4. ROTTENHOFFER v. LENTHALL, E. T. 1689, K. B. Carth. 136; S. C. 1 Show. 146; SYMS v. TYMS, 1 Show. 98. DENTON v. EVANS, M. T. 1698, 1 Lutw. 600. S. P. ANON, M. T. 1701, 7 Mod. 62. ROGERS v. MAYOE, Carth. 1. ABDY v. BAXTER, Carth. 1.

To an action of debt brought upon a judgment, the defendant pleaded that he had brought a writ of error to reverse the judgment, and concluded in abatement. Upon a general demurrer the plea was adjudged ill, and the defendant was ruled to answer over.

See Dyer. 32, n. a; Sid. 236; 2 Vent. 261; 1 Mod. 121; 3 Salk. 55; Cowp. 72; 5 Com. Dig. Pleader, 2 W. 39.

V. GENERAL QUALITIES OF PLEAS IN ABATEMENT.

(A) DIFFERENCE BETWEEN PLEAS IN ABATEMENT AND PLEAS IN BAR.

1. EVANS *qui tam* v. STEVENS, E. T. 1791, K. B. 4 T. R. 224. COPELY v. DELAUNOY, M. T. 1703, K. B. 2 Lord Raym. 1055. FERQUIRE v. KY-

* But although "a writ of error pending" cannot be pleaded to an action of debt on a judgment, because the transcript only and not the record itself is removed; *Adams v. Matter Tomlinson*, 1 Sid. 236; yet the Court will under certain circumstances, stay the proceedings in the action until the writ of error is determined. See *Taswell v. Stacey*, 4 Barr. shows that 2454; *Grobe v. Abbott*, Cowp. 72; *Box v. Bennett*, 1 H. Bl. 432; *Entwistle v. Shepherd*, the plaintiff 2 T. R. 78; *Christie v. Richardson*, 3 T. R. 78; *Pool v. Charnock*; 3 T. R. 79; *Kemp* cannot com land v. Macauley, 4 T. R. 436; *Evans v. Gilbert*, 4 T. R. 436. n; *Miller v. Newbold*, 1 East, 662; *Spooner v. Garland*, 2 M. & S. 474; *Hawkins v. Snuggs*, 2 id. 476; *Bedford v. Garrod*, 1 B. Moore 258; 2 Chit. Rep. 191.

A writ of error pending may be pleaded in abatement to an action of debt on the judgment. *Vi de infra*, 27.

If such a plea conclude with a prayer of *quod erit inde sine die quousque*, it is bad. *Quere*, whether it can be pleaded in any form.

[27]

Semb. the it cannot.*

Matter which merely defeats a present action should be pleaded in

mence an action at any time must be pleaded in bar.*

NASTON, E. T. 1705, K. B. id. 1249. *MILES v. WILLIAMS*, T. T. 1712, K. B. 10 Mod. 160; id. 243; S. C.; *Gilb.* 318; 1 P. Wms. 249; S. C.

Actions for penalties under 22 Geo. 3. c. 41. The declaration stated that the plaintiff sued as well for the treasurer of the division of the town of Seaford as for himself. After a general imparlance defendant pleaded that Seaford is not such a division whereof or for which a treasurer is or can be appointed, and concluded in abatement. Replication introducing new matter. Demurrer and joinder.

Per Cur. This plea is defective in substance, because it does not tend to afford the plaintiff a better writ, but conduces to show that the plaintiff is forever concluded from supporting an action for the recovery of the penalties.

Co. Lit. 128, b; Bro. V. M. 252; 1 Bac. Ab. Abatement, N; 1 Com. Dig. Abatement, B; *Gilb. C. P.* 200; see post.

2. *W. MAINWARING, G. B. MAINWARING, and T. CATTERIS v. NEWVAN*, H. T. 1800, C. P. 2 B. & P. 120; *MOFFATT v. VANMILLIGEN*, E. T. 1786 K. B. id. 124, n.

Hence a plea that one of several plaintiffs is jointly liable with the defendant is no bar.

[28]

The declaration in this case stated in substance that a person of the name of Brandes had made a promissory note to three persons, namely to Newman, to himself (Drandes), and to T. Chatteris. The note was endorsed to W. Mainwaring, G. B. Mainwaring, and T. Chatteris, the plaintiffs on record. The defendant pleaded in bar that T. Chatteris, one of the payees and endorsers of the note, was one and the same person as T. Chatteris, one of the plaintiffs, and that he was jointly liable with the defendant as such endorser. Demurrer and joinder.

Per Cur. The facts disclosed in this plea have been properly pleaded in bar, because a plea in abatement ought to give to the plaintiff a better writ, and not show that he can have no action at all. Judgment for defendant.

See 1 Rol. Ab. 176; Cro. Eliz. 554; Vin. Ab. tit. Abatement, E. 6; id. R. 6; Com. Dig. Abatement, 12; 6 T. R. 766; 7 T. R. 274; 8 T. R. 140; 1 East, 369; 5 407 id.; 1 Carth. 121; 1 Saund. 291, n. 4.

(B) WHAT OUGHT OR MAY BE PLEADED IN ABATEMENT.

1. *MAJOR v. BRIDE*, E. T. 1754, C. P. 1 Mod. 214; 2 id. 63. S. C. Freem. 208, S. C.

A matter may be pleaded in abatement though it might be pleadable in bar.

Per Cur. A plea may be a good plea in abatement, though it may contain matter in bar to the action. 10 Hen. 7, fol. 11; *Salkell v. Shelton*, 2 Roll. Rep. 64; 2 Saund. 209, 210, n; 10 Mod. 192, 211; 1 Lord Raym. 593; 2 id. 1207; 1 Salk. 3. 210; 3 id. 1; 1 Lutw. 42; 1 Show. 4; 1 East, 634; 2 Marsh. 299; 6 Taunt. 587; 1 Chit. Pl. 434-5, 3d edit; and post, p. contra.

2. *COAN v. BOWLES*, E. T. 1689, K. B. Carth. 124; 4 Mod. 7; 1 Show. 15. 165; 1 Salk. 205. S. C. not the same point. *GRAVENOR v. STEVENS*, T. T. 1712, K. B. 10 Mod. 166.

That which ought to be pleaded in abatement can never be assigned for error.

Per Cur. A man shall never assign that for error which he might plead in abatement, for neglecting to take the objection in proper time is his imprudence; hence if a *feme covert* bring an action in her own name by attorney, and the defendant plead in bar, he shall never afterwards be allowed to assign the coverture for error.

17 E. 3. 70. b; 48 Ed. 3. 10. b, 1 Com. Dig. Abatement, K. 2.

3. *WEST v. SUTTON*, E. T. 1703, K. B. 2 Lord Raym. 853, 1 Salk. 2; Holt, 3. S. C.

Matter of disability, which might have been pleaded to the action, not pleadable to a *scire facias* on a judgment.

Per Cur. The plaintiff had sued out a *scire facias* upon a judgment in assize obtained against the defendant for the office of Marshall in the King's Bench. The defendant pleaded in abatement that the plaintiff was an alien enemy, &c.

* As a plea must be either in abatement or in bar; and as a plea in bar and in chief are synonymous, a defendant, when under an obligation to plead in chief, cannot plead in abatement. 1 Com. Dig. Abatement, B. 2. cites Dal. 68,

Per Cur. The plea is ill, because this matter ought to have been pleaded to the original action; for the plaintiff having been admitted to be able to recover judgment, he cannot be disabled from having execution upon it by matter precedent to the judgment. A *respondeas ouster* awarded. See Co. Lit. 303; 1 Sid. 182; Comb. 186, 311; Ca. Temp. Hard. 237; Cowp. 728; 2 Stra. 1043. [29]

4. *HARDING v. SALKELL.* M. T. 1692. K. B. 1 Salk. 296.

In debt against the defendant as executor, the defendant pleaded in bar that he was administrator. That one sued as executor is administrator

Per Cur. This is not pleadable in bar; for if an action be brought against an administrator by the name of executor, and judgment had therein, the judgment may be pleaded in bar to another action brought against him as administrator. See Dy. 305, pl. 61; 1 Mod. 239; Comb. 220; Sty. 385. must be pleaded in abatement.

5. *NOWLAN v. GEDDES.* T. T. 1801. K. B. 1 East, 634.

To a declaration, averring that one of two joint contractors had been outlawed, the defendant pleaded *nul tiel record* of outlawry; and concluded with a verification and prayer of judgment, *quod caperet*; to which there was a general demurrer and joinder. A plea negating the outlawry of a co-contractor, must be in abatement:

Per Cur. The plea is in effect that another joint contractor was not sued, which is a plea in abatement; and therefore as the present plea concludes in bar, it is bad on general demurrer. In the case of *Harris v. Moor* (cited in 5 Burr. 2614), it does not appear on the face of the declaration that the other joint obligor had been outlawed. Judgment, *quod recuperet*, &c. and if it concludes in a bar, it is a plea in bar, and the plaintiff is entitled to judgment, *quod caperet*.

As to the prayer of judgment, see 2 Saund. 209, 210, n; Lutw. 42; 1 Show. 4; 1 Lord Raym. 593; 2 id. 1017; 1 Salk. 3; 2 id. 210; 2 Mod. 64; 10 id. 192, 211; 6 Taunt. 587; 2 Marsh. 299; and post.

6. *WARMSLEY v. MACEY.* H. T. 1821. C. P. 5 Moore, 168.

To a declaration in an action of assumpsit against the defendant as acceptor of a bill of exchange, a plea was filed, which, after setting forth the several statutes regulating the executions of process, showed the arrest of the defendant by a wrong name, his being subsequently set at large, the writ being unduly altered as to the name, and his being arrested again thereon, and concluded by alleging that the proceedings in the writ were absolutely bad and void in law. And this, &c. wherefore, &c. An irregularity in the proceedings must if available at all by plea, be pleaded in abatement.

Special demurrer to plea, assigning for cause that the plea was no answer to the plaintiff's declaration, and that the facts stated in the plea could not by law or the rules of pleading, be properly made the subject of a plea in bar, or answer to the declaration. Joinder on demurrer.

Per Cur. The defendant ought either to have pleaded the misnomer in abatement, or have moved to set aside the proceedings; but as he has adopted neither of these remedies, we are of opinion, that as the plea does not go the merits it cannot be supported. The plaintiff is therefore entitled to judgment. See 2 B. & P. 45; 2 East, 442; 4 East, 311; 7 East, 153; 8 East, 344; 10 East, 377; 2 Camp. 396; 16 East, 39; 1 B. & A. 393; 1 D. & R. 50; post, tit. Pleading; and Petersdorff on Bail, 259.

[30]

(C) WHAT CANNOT BE PLEADED IN ABATEMENT.

1. *BOWLER v. SPATHURST.* E. T. 1695. C. P. 1 Lutw. 31.

Declaration in assumpsit for work and labour. Plea, *avul action pendent*, on a writ directed to the sheriff of Wilts, with an averment that both suits are for the same cause. Replication, admitting the first writ, but alleging that no proceedings were had upon it, and that another writ of the same date was sued out, directed to the sheriff of Southampton. Demurrer and joinder on demurrer. That which is bad on the face of the plaintiff's own pleadings need not be pleaded in abatement.

Per Cur. The replication cannot be supported, for the venue is laid in Middlesex, and the plaintiff by his replication confesses that the writ to which the defendant has appeared, and on which the plaintiff has declared, was directed to the sheriff of Southampton, which cannot be correct, for the action is laid in Middlesex. By the allegation that the appearance of the defendant was on

a writ directed to the sheriff of Southampton, the plaintiff has of his own showing falsified his writ. Judgment was given that the writ should abate. See 11 Ass. pl. 9; 4 Edw. 4, 32; 3 Co. 16; 1 Rol. 176; Hob. 281; Cro. Car. 272.

2. ANON. M. T. 1704. K. B. 3 Salk. 1. OWEN v. BUTLER. T. T. 1697. K. B. 1 Ld. Raym. 345; Comb. 488; S. C. BARBER v. PALMER. T. T. 1760. K. B. 1 Ld. Raym. 693; 1 Salk. 178; 12 Mod. 539. S. C. HACKETT v. TILLY. 2 Lord Raym. 1207.

Matter in bar cannot in general be pleaded in abatement.

An administrator brought an action of debt on a bond; the defendant pleaded in abatement that administration was granted to another. Demurrer and joinder.

That which is a defence under the general issue cannot be pleaded in abatement: hence in *assumpsit* defendant cannot plead that the promise was made after the commencement of the action and not before.

Per Cur. Defendant must answer over, for matter in bar cannot be pleaded in abatement. See *supra*; 21 Hen. 6, n. 18; 7 Hen. 6, 13; 3 H. 7, 14; Br. Brief, 553; Cro. Eliz. 102, 111; Yelv. 115; Dy. 202, pl. 69.

3. FACQUIRE v. KYNASTON. E. T. 1705. K. B. Lord Raym. 1249.

To an action of *assumpsit* the defendant pleaded in abatement that the promises in the declaration were made *tiel jour*, which was after the commencement of the action, and traversed that they were made before, to which the plaintiff demurred.

Per Cur. Although property is in a stranger or *pris en auter lien*, may be pleaded either in bar or in abatement in replevin, there is no analogy between the plea of *non cepit* and the general issue in *assumpsit*. In the former these matters could not be given in evidence under *non cepit*, though in the latter, under *non assumpsit*, they might; and that if there had been any fact to support this plea, the defendant should have pleaded the general issue.

See James v. Fowks, 12 Mod. 107; Brown v. Cornish, 1 Lord Raym. 217; Vanhalton v. Moss, 2 Ld. Raym. 787; 1 Holt, N. P. 16; Form of Demurrer to Plea that it amounts to the general issue, 3 Chit. Pl. 571, 3d edit.

4. ANON. T. T. 1676. C. P. 1 Mod. 250.

A defendant pleaded *non tenure*, and commenced his plea *quod peritente redere non debet*, but concluded it in abatement.

Per Cur. *Non tenure* is a plea in bar. The conclusion is incorrect, but the defendant may amend it. See 4 Bac. Ab. 105; 1 Lord Raym. 229.

Non tenure cannot be pleaded in abatement;

[31]
Or in an action by an administrator, a prior grant of administration to a third person

5. HACKETT v. TILLY. M. T. 1704. K. B. 2 Ld. Raym. 1207.

Debt on bond by the plaintiff as administrator of T. H. deceased. The bond was dated 20th May, 1695, and administration, was stated to have been granted to the plaintiff on the 14th May, 1705. The defendant, after craving over of the letters of administration, pleaded in abatement, that before the granting of the letters of administration to the plaintiff, prior letters had been granted to J. S. who had taken upon himself the administration of the intestate's effects, and is still alive. To this plea the defendant demurred.

In support of the demurrer it was contended that the matter stated in the plea could not be made available in abatement, as it entirely destroyed all right of action in the plaintiff. Hence it has been ruled that if a suit be brought against a defendant as executor, and the defendant pleads that J. S. died intestate, and the administration was granted to him, this is no bar to the action, but only pleadable in abatement.* In this opinion the Court concurred. Judgment of *respondens ouster* awarded.

6. HARECOURT v. HASTINGS. E. T. 1691. B. K. 3 Salk. 19.

In an action of *assumpsit* the defendant pleaded in abatement that the declaration was uncertain, and in other respects defective.

Sed Per Cur. It shall not be allowed for the defendant to take advantage of any errors apparent in the declaration under a plea in abatement; he ought to demur. Judgment, that he answer over.

7. DOCKMINIQUE v. DAVENANT. T. T. 1703. 1 Salk. 220, 6 Mod. 198.

Per Cur. If a defendant demur in abatement, the Court will, notwithstanding

* Gronwell v. Selby, 2 Lev. 190; Dy. 202. pl. 69; 3 H. 7. 14; 4 H. 7. 17; 7 H. 6. 13; 31 H. 6, 13; 1 Brownl. 97; Yelv. 115.

No advantage can be taken by plea in abatement of a demurrable defect in the declaration. And if it be so pleaded, final judgment will be given.

ding, give a final judgment, because there cannot be a demurrer in abatement; for if the matter be extrinsic, the defendant must plead it; if intrinsic, the Court will take notice of it themselves. See 1 Show. 91.

(D) WHEN A PLEA IN ABATEMENT BY ONE OF SEVERAL SUFFICES FOR ALL
STAPLER V. HEYDON. 1702. T. T. K. B. 2 Lord Raym. 920.

Per Cur. Although a bill may be abated as to part of the trespass, and stand good for the rest, yet we never knew it abated as to one defendant and stand good against the other. A plea in abatement by one abates the action as to

See Hob. 250; 1 Com. Dig. Abatement, I. 9; Chit. Pl. 444. and 447. 3d ed.; 1 Saund. 285; 2 id. 210. n.

VI. WITHIN WHAT TIME TO BE PLEADED.

[32]

(A) IN GENERAL,

1. LONG V. MILLER. T. T. 1742. K. B. 1 Wils. 23. S. C. 2 Stra. 1192. S. P. ANDERSON T. BADDISLADE. E. T. K. B. 176. 2 id. 1268; ANON. T. T. 1703. K. B. 6 Mod. 175. ANON. E. T. 1701. K. B. 11 Mod. 2. HOLDITCH V. AINSWORTH. E. T. 1693. K. B. Comb. 251. BRANDON V. PAYNE. E. T. 1787. K. B. 1 T. R. 689. JENNINGS V. WEBB. T. T. 1786. K. B. 1 T. R. 278. SMITH V. MILNES. E. T. 1790. K. B. 3 T. R. 617. DOUGHTY V. LASCELLES. H. T. 1792. K. B. 4 T. R. 520. HARBORD V. PERIGAL. 5 T. R. 210. HUTCHINSON V. PLEAS IN A BROWN. E. T. 1797. K. B. 7 T. R. 298. BINNS V. MORGAN. 11 abatement East, 411. BINFIELD V. MASWELL. H. T. 1812. 15 East, 159. must be SMITH V. WHYMALL. M. T. 1785. K. B. cited Tidd, 663. n. a. 7th ed. pleaded within four ANON. E. T. 1722. C. P. Ca. Prac. 23. BIDDLESTON V. ATCHER- days after LEY. E. T. 1730. C. P. Ca. Prac. 64; Prac. Reg. 286. THRELKELD the delivery V. GOODFELLOW. T. T. 1732. C. P. Barnes. 224. MAUND V. MAWLEY, or filing a T. T. 1801. Excheq. Forr. 149. notice of

Declaration was delivered within the term; a rule to plead was given on the 7th, which expired on the 11th; defendant applied for further time to plead, but no order was obtained. The defendant, after the time for pleading had expired, and before plaintiff had signed judgment, pleaded in abatement. Unless the declaration be delivered or filed after the term, or within the last four days of the term: in either of which cases the defendant in the King's Bench may within the first four days of the next term, plead in abatement as of the preceding term.

Per Cur. The plaintiff is entitled to judgment; for pleas in abatement must be pleaded within four days, if the declaration be delivered before the last four days in term; if in these last four days, defendant must plead, after a special imparlance, within the first four days of the ensuing term. [33]

See Style, P. R. 458, 468; Willes, 239; 1 Tidd. 662. 7th ed.; 2 Arch. Prac. K. B. 1; 1 Com. Dig. Abatement, I. 18; 1 Bac. Ab. Abatement, C; Vin. Ab. tit. Connusance, 591; 1 Saund. 1. n. 2; 1 Chit. Pl. 448. 3d ed.; Gibb. K. B. 317; Gibb. C. P. 183, 184.

2. ANONYMOUS. M. T. 1701. 7 Mod. 62. ANON. M. T. 1697. K. B. 1 Salk. 367. HOLDITCH V. AINSWORTH. E. T. 1693. K. B. Comb. 251. Bench may
It was stated by the secondary, and acquiesced in by the Court, that if a declaration be delivered the last day of a term, the defendant shall have four days in a subsequent term to plead in abatement; or if the declaration be delivered on the last day of the term, as of a precedent term, the party shall have four days after the actual delivery of the declaration to plead in abatement. first four days of the next term, plead in abatement as of the preceding term.

See R. E. 5 Ann. a. K. B.; 1 Tidd, 662; 1 Arch. Prac. K. B. 2.

3. THRELKELD V. GOODFELLOW. M. T. 1733. Ca. Prac. C. P. P. 78; Prac. Reg. C. P. 1; Barnes, 224. S. C. NAPIER V. BIDDLE. M. T. 1735. Barnes, 334. S. P.

On a motion to have the imparlance roll brought into court, that a special imparlance might be entered, to enable the defendant to plead in abatement; the question was, whether a plea in abatement could be pleaded within the first four days of the subsequent term without a special imparlance, or whether a special imparlance should be granted. After in the Common Pleas without first obtaining a special imparlance,

By the Court. It is the established practice where the declaration is deliv-

which is granted by the prothonotaries.

ered so late that the defendant is not obliged to plead in the same term, for him to apply to the prothonotary for a special imparlance, within the first four days in the succeeding term, or he cannot plead in abatement, which he would be entitled to do, on obtaining such special imparlance; but to all declarations where the defendant is to plead the same term, the defendant may plead in abatement within four days after declaration delivered, without any imparlance; but in such case, after the four days, no such plea shall be accepted, though no rule to plead be given. See *Grant v. Lord Sondes*, 2 Bl. Rep. 1196.

(B) BEFORE DECLARATION.

DOUGLASS V. GREEN. H. T. 1820. K. B. 2 Chit. Rep. 7.

Defendant cannot plead in a abatement before a declaration has been filed or delivered.

Defendant in this case was arrested by a wrong name, but immediately informed the plaintiff of the mistake, and before declaration, filed a plea in abatement. On the following day the plaintiff declared against defendant by his right name, and signed judgment as for want of a plea, the defendant having neglected to plead *de novo*. Defendant moved to set the judgment aside.

Sed per Cur. If defendant pleads before the plaintiff declares, it is considered as no plea. Judgment has been therefore regularly signed. R. Ref.

Vide 4 East, 448.

(C) BEFORE APPEARANCE.

WAKEFIELD V. MARDEN. M. T. 1807. K. B. 2 Chit. Rep. 8.

A plea in abatement before defendant has entered an appearance is a nullity.

Rule nisi to set aside judgment for want of a plea, on the ground that a plea in abatement had been duly filed. *Sed Per Cur.* Although the plea may have been regularly filed, yet, as the defendant has not entered an appearance the judgment is correct. R. Dis. See 1 Tidd, 477, 663. 7th ed.

(D) BEFORE BAIL PUT IN.

1. — *v. HICKS.* M. T. 1670. 2 Keb. 824; 1 Vent. 154. S. C.

[34]
After putting in special bail defendant cannot plead in abatement; *vide infra*.

Privilege may be pleaded in abatement notwithstanding bail has been put in.

Per Cur. After a defendant has himself put in bail generally he cannot plead misaddition in abatement, though if he put in specially, or put in by another, they may plead it in abatement. See *Hole v. Finch*, 2 Wils. 393; *Mercedith v. Hodges*, 2 N. R. 458; *Gould v. Barnes*, 3 Taunt. 504; post, tit. Addition; Misnomer.

2. *DASHWOOD V. FOLKS.* M. T. 1691. C. P. 3 Lev. 343.

Debt on bond. Plea, that the defendant is privileged as *custos breviarum* of the Court of King's Bench; replication, that he ought not to be admitted to avail himself of his privilege, because it appears on the return of the *capias* that he has put in special bail. Demurrer to replication. In support of the demurrer it was contended, that the defendant, by the act of putting in special bail, had submitted to the jurisdiction of the court, and therefore could not avail himself of this privilege. *Sed per Cur.* Putting in, either special or common bail, is no admission of the jurisdiction of the court; for until bail is put in, the defendant is not in a situation to plead, nor is the plaintiff bound to declare against him. Demurrer overruled. See post, tit. Addition; Misnomer; Privilege; and 1 Id. Raym. 249; 1 Salk. 8; Barnes, 94; 3 T. R. 611.

3. *SAUNDERS V. OWEN.* M. T. 1822. K. B. 2 D. & R. 252.

And new bail must be put in, or the plea is a nullity.

The plaintiff declared *de bene esse*, and demanded a plea; defendant pleaded in abatement, but did not put in and perfect special bail until after he had pleaded. The plaintiff treated the plea as a nullity, and signed interlocutory judgment. A rule nisi was obtained to set it aside.

Sed Per Cur. The rule must be discharged with costs.

4. *DIMSDALE V. NEILSON.* T. T. 1802. K. B. 2 East, 406.

But the bail need not justify in a country cause;

After putting in and justifying special bail in the country; the defendant, on being served with a declaration, filed a plea in abatement. Notice of exception was given on the following day, in consequence of which the bail afterwards justified in court; but notwithstanding the bail having justified,

judgment was signed by the plaintiff on the day after the justification, as for want of a plea, and notice given of his intention to execute a writ of inquiry. A rule nisi was now obtained to set aside the interlocutory judgment signed by plaintiff, with costs, and for a stay of proceedings.

Per Cur. The defendant, after he has put in bail, is regularly in court, unless it ultimately turn out that they are unable to justify, here the defendant has done all that was in his power, and all that the nature of the circumstances would admit. Rule absolute.

See 1 Salk. 98, 6 Mod. 24, 1 T. R. 635, 2 id. 719, 4 id. 578.

5. *BINNS v. MORGAN*, T. T. 1809, 11 East, 411, *S. P. HOPKINSON v. HENRY*, M. T. 1810, 13 East, 170.

Rule to set aside an interlocutory judgment signed as for want of a plea. [35]
After the defendant was arrested, a declaration was filed conditionally on the 20th of April; the bail afterwards justified. The plaintiff demanded a plea on the 1st of May, and, on the 2d of May the defendant filed a plea of misnomer. The question was, whether the plea was filed in proper time? Or in a town cause, provided they be ultimately perfected in due time.*

Per Cur. The plea is clearly out of time, the defendant should have put in bail within the four days allowed by the practice of the court for pleading in abatement, the proceedings would then have been regular, and the bail might afterwards have been perfected. Rule discharged. In the Exchequer a defendant must plead in abatement with four days after the return of the writ, and justify his bail, whether the plaintiff except to them or not, *Quere*, if not overruled; *videsupra*.

See *Holland v. Sladen*, M. 47 Geo. 3. K. B. in notis, 11 East. 411.

6. *MAUND v. MAWLEY*, T. T. 1801, Excheq. 149.

The defendant, an attorney, was arrested in Easter vacation upon process returnable on the first return of Trinity Term. Four days after the return of the writ he put in bail which were excepted to, and afterwards justified; immediately after which the defendant tendered a plea of privilege in abatement, which the plaintiff refused to accept, and signed judgment as for want of a plea. It was contended on behalf of the plaintiff, that the rule, that a plea in abatement must be put in within four days after the return of the writ, is peremptory; and therefore if the defendant wish to avail himself of such a plea, he must justify his bail within that time. The Court, adopting this opinion, discharged the rule with costs.

(E) AFTER FORFEITURE OF BAIL BOND.

ANON, T. T. 1701, 2 Salk. 519.

If a forfeiture of the bail bond be incurred, and the Court as an indulgence, stay proceedings thereon, the defendant cannot, afterwards plead in abatement to the original action, but must plead over to the merits. After bail bond forfeited, defendant cannot plead in a batement to the original action.

See *Garrett v. Johnson*, 2 B. & P. 465; 1 Salk. 7; *Willes*, 461; *Barnes*, 96; 3 Taunt. 565; post, tit. Misnomer; and *Petersdorff on Bail*, 226.

(F) AFTER A GENERAL IMPARLANCE.

1. *GRANWELL v. SIBLEY*, E. T. 1776, K. B. 2 Lev. 190. *S. P. HARKER v. MORELAND*, T. T. 1696, K. B. 2 Lev. 197. *DACRES v. DUNCOMB*, H. T. 1671. 1 Vent. 236; 2 Lev. 82; 3 Keb. 127. *S. C. BARRINGTON'S CASE*, Hardres, 164. *BARCELOT v. BURTON*, E. T. 1686, C. P. 1 Lutw. 22. *ANON*. M. T. 1669, K. B. 1 Mod. 15. *HALL v. JACKSON*, E. T. 1697, K. B. Comb. 479. *WENTWORTH v. SQUIB*, E. T. 1700, C. P. 1 Lutw. 43. *CAMFIELD v. WARREN*, E. T. 1699, 1 Lutw. 639. *DUNCOMB v. CHURCH*, M. T. 1696, 1 Lord Raym. 93. *COLVIN v. FLRITCHER*, E. T. 1721, K. B. 8 Mod. 43; 1 Stra. 520. *S. C. NAPPER v. BIDDLE*, M. T. 1735, C. P. Barnes, 334. *THREL-*

* A defendant, however, cannot plead in bar until the bail are perfected; and if he plead before, the plea may be treated as a nullity, although the bail subsequently justify. 4 T. R. 578. See observations on this case by Lawrence, J. in *Dimsdale v. Nielson*, 2 East. 407.

KELD V. GOODFELLOW, E. T. 1751, C. P. Barnes, 224. GRANT V. LORD SONDES, E. T. 1775, C. P. 2 Bl. Rep. 1094. EVANS V. STEVENS, E. T. 1791, K. B. 4 T. R. 224. BUDDLE V. WILLSON, T. T. 1795, K. B. 6 T. R. 869. ONSLOW V. SMITH, E. T. 1801, C. P. 2 B. & P. 385. LLOYD V. WILLIAMS, E. T. 1814, K. B. 2 M. & S. 484.

Matter in abatement cannot be pleaded after a general imparlance.

In an action of debt against defendant as executrix of her husband, the defendant pleaded, after a general imparlance, that her husband had died intestate, and that administration had been committed to her *absque hoc*, that she was executrix, and ever administered as such. To this plea the plaintiff demurred.

Per Cur. This plea is clearly a plea in abatement, and cannot therefore be pleaded after a general imparlance. Vide *Semb. contra*, Green v. Moore, 5 Mod. 11; 2 Keb. 143, pl. 16; and see Dy. 210; Doc. Plac. 234; Latch. 83; Willes, 239; 1 Com. Dig. Abatement, 120; Vin. Ab. Connusance, p. 591; 1 Bac. Ab. Abatement, C; 2 Saund. 1, n. 4; 1 Chit. Pl. 423; 1 Tidd. 663, 7th ed; 2 Arch. Prac. 1; post, tit. Addition, Attorney, Jurisdiction, Misnomer, Nonjoinder, Privilege.

2. BARCELOT V. BURTON, E. T. 1686, C. P. 1 Lutw. 23.

And if so pleaded the imparlance may be replied by way of assumpsit.

Assumpsit for goods sold and delivered; plea, coverture in abatement; replication, that the plea is in abatement, and it is pleaded after a general imparlance. Judgment of *respondens ouster* awarded.

See 2 Saund. 1, n. 2; Forms, 1 Lutw. 23; 3 Inst. Cl. 39; Chit. 18, pl. 46; 19, pl. 50; 20, pl. 53-4.

3. DACRES V. DUNCOMB, H. T. 1671, 1 Vent. 235.

But if the plaintiff reply instead of demurring, or alleging the assumpsit, the defect is aid.

In trover the defendant, after a general imparlance, pleaded *autre action pendente* for the same property.

Per Hale, C. J. Though after an imparlance the defendant cannot plead a misnomer, or the like, or ancient demesne, because this is an admission that he ought to answer the writ, yet such a plea in abatement as this may be received. But this comes not in question, because the plaintiff has replied to it, and has not demurred. See 2 Saund. 3, n; 1 Sid. 319, pl. 9; 1 Lutw. 23; 1 Com. Dig. Abatement, I.

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4. BUDDLE V. WILLSON, T. T. 1795, K. B. 6 T. R. 369. NAPPER V. BEDDLE, M. T. 1755, C. P. Barnes, 334. BREWSTER V. CAPPER, H. T. 1749, C. P. 1 Wils. 261; S. C. 1 W. Bl. 51. ONSLOW V. SMITH, E. T. 1801, C. P. 2 B. & P. 384. EVANS V. STEVENS, E. T. 1791, K. B. 4 T. R. 224. LLOYD V. WILLIAMS, E. T. 1814, K. B. 2 M. & S. 484.

Advantage however of the irregularity may be taken under a general demurrer.

A declaration was filed as of Hilary Term against the defendant, for the loss of property entrusted to his care, in the capacity of a common carrier.

The defendant, after an imparlance to Easter Term, pleaded in abatement, that the goods mentioned in the declaration were delivered to, and received by, the defendant and certain other persons jointly, who were his co-partners. General demurrer to plea.

It was contended, that though the defendant might not in strictness be entitled to plead in abatement after a general imparlance, yet the mode adopted by the plaintiff was not a proper manner of taking advantage of the objection; that the omission to file the plea in proper time is a mere matter of irregularity, and not such a defect as could be made available on general demurrer.

Per Cur. We are clearly of opinion that the plea is untenable after a general imparlance, and that judgment of *respondens ouster* must be awarded.

5. DOUGHTY V. LASCELLES, H. T. 1792, 4 T. R. 520. BLACKMORE V. FLEMING, M. T. DOUGLAS V. GREEN, H. T. 1820, K. B. 2 Chit. Rep. 7, 7 T. R. 446.

The declaration in this case had been delivered before the essoign day of Michaelmas Term, entitled as of Trinity Term, with notice to plead within the first four days of the former term; the defendant within that time pleaded a misnomer in abatement, but the plaintiff having signed judgment, a rule

was obtained to set it aside. In showing cause, it was argued that the misnomer should have been pleaded not only within the first four days, but as of the precedent term; and that as it was neither pleaded as of the preceding term, nor after a special imparlance, the plaintiff was entitled to retain his judgment. The Court concurring in this opinion, the rule was discharged.

See 2 Saund. 1, n. 5; Jennings v. Webb, 1 T. R. 277; 2 Saund. 1, n. 2.

6. HOLME v. DALBY. M. T. 1819. B. K. 1 Chitty, 703; S. C. 3 B. & A. 259. The prece-
A bill was filed in vacation as of the preceding term, with the usual memo-
randum. The defendant pleaded his privilege in abatement, entitled general-
ly of the succeeding term, without any imparlance. Judgment was signed as
for want of a plea, and a rule nisi obtained to set the judgment aside.

Per Cur. The general rule which authorizes the plaintiff to sign judgment
as for want of a plea, when a plea in abatement is entitled of a term subse-
quent to the declaration, and pleaded without an imparlance, cannot possibly
apply to a case of this nature, where it appears on the face of the bill that no
imparlance, could, without incongruity, have been stated, as the bill was not in
existence during any part of the prior term. R. Ab.

See Willes v. Walker, 2 Saund. 2, n. 2.

(G) AFTER SPECIAL IMPARLANCE.

1. GAWEN v. SUREY. T. T. 1682. C. P. 1 Lutw. 6.

The defendant, after a special imparlance, pleaded outlawry in abatement,
and produced the *capias ulagatum*. Demurrer and joinder. Judgment of re-
spondeas ouster awarded, because the plea commenced by stating a full instead
of a half defence. As to the imparlance, see Grant v. Sondec, 2 Bl. Rep.
1094; Bac. Ab. Pleas, C. 4; 2 Salk. 8.

1. BARKER v. FORREST. M. T. 1722. K. B. 1 Stra. 532.

In the Common Pleas the defendant, after special imparlance, had pleaded
his privilege as an attorney of the Court of King's Bench in abatement; the
plaintiff negatived the privilege in the replication, and concluded to the coun-
try. Demurrer to replication and joinder. On a writ of error to the King's
Bench, that Court said, that although the conclusion of the replication was
bad, yet the plea could not be supported, as it was filed after an imparlance,
though a special one. *Sed vide* Clapham's case, Hard. 362, where it is said
that personal privilege can be pleaded, if the imparlance be *salve omnibus ad-*
vantageis quibuscunque. *Vide post* Neave v. Nelson, 1 Lev. 54; 1 Keb. 195, 196,
221, 256; 1 Com. Dig. Abatement, J; Bac. Ab. Pleas, C. 4; 1 Chit. Pl. 424,
3d ed.; Gilb. C. P. 184.

(H) AFTER A GENERAL SPECIAL IMPARLANCE.

1. NEAVE v. NELSON. H. T. 1660. 1 Lev. 54; 1 Keb. 195, S. C.

In debt in the King's Bench against an attorney of the Common Pleas who
imparled specially; saving to himself all exceptions, and pleads his privilege.
Demurrer to plea. In support of the demurrer it was contended, that privi-
lege could not be pleaded after such an imparlance; the defendant should have
reserved liberty to plead to the jurisdiction of the court, and have saved to
himself all advantages and exceptions whatsoever, as well to the writ and de-
claration as to the jurisdiction of this court. The Court concurring in this
opinion, judgment of *respondeas ouster* was awarded.

See 2 Bl. Rep. 1094; 3 Saund. 1, n. 8.

2. WENTWORTH v. SQUIB. E. T. 1700. C. P. 1 Lutw. 44.

To an action of debt on bond, defendant, after an imparlance, saving to him-
self all and every exception and advantage, as well to the jurisdiction of the
court as to the writ and declaration, pleaded the privilege of the Exchequer
in abatement. Demurrer, and joinder in demurrer. It was objected to the

* In Doughty v. Lascelles it was said, in argument, the plaintiff might move to set
aside the plea; and the observation was repeated in Biddle v. Wilson, 7 T. R. 372; and
see 1 Chit. Pl. 448. 3d ed.; 2 Tidd, 704. 7th ed.

plea, and admitted by the Court, that an imparlance with a saving of all exceptions to the jurisdiction was unprecedented, and that it could only in effect be equivalent to an imparlance saving exceptions only to the writ and declaration, and that the plea could not therefore be supported. But it was agreed that the plea would have been valid, had the imparlance been saving all advantages whatsoever. Clapham's case, Hard. 365; Anon. 12 Mod. 529; Gilb. C. P. 185; see the forms, Herne, 10; 2 Chit. Pl. 440.

(I) AFTER OYER.

See Harker v. Moreland, T. T. 1676. K. B. 2 Lev. 197; Dinghurst v. Batt, T. T. 1684. 3 Lev. 219; 1 Com. Dig. Abatement, I; Vin. Ab. Oyer, F; Bac. Ab. Pleas, L. 12; 1 Keb. 32; 2 Lev. 142; 2 Ld. Raym. 970; 6 Mod. 28; 12 id. 99; 2 Show. 310; 1 Saund. 289; 2 id. 2, n. 2.

(J) AFTER A VIEW.

. DINGHURST V. BATT. T. T. 1684. 3 Lev. 219.

After a view, the defendant can not plead in abatement any thing that does not arise up on the view. In a formedon in remainder, the tenant pleaded in abatement a defect for want of proper parties. it was argued for the demandant that as a view had been granted, nothing could be pleaded in abatement except such matters as might have arisen upon the view; and the Court concurring in this opinion, the plea was overruled. See 41 E. 3, 29, 33; 8 E. 3, 55; 40 E. 3, 35, 36; Com. Dig. Abatement, I. 25; Smith v. Frampton, 3 Lev. 405.

(M) TIME FOR PLEADING IN ABATEMENT, HOW COMPUTED.

1. JENNINGS v. WEBB. T. T. 1786. K. B. 1 T. R. 277. S. P. HAREORD v. PERIGAL. E. T. 1793. 5 T. R. 210

The four days allowed for pleading in a batement are both inclusive. On a motion to set aside a judgment for irregularity, it appeared that the plaintiff had delivered his declaration on the 16th of May, and that the defendant had pleaded in abatement on the 20th of the same month.

Per Cur. As pleas in abatement and pleas to the jurisdiction are dilatory, and ought not to be encouraged, the four days allowed for pleading them are both inclusive. Rule discharged.

See MS. decisions referred to in the case; and 2 Stra. 1192; 3 T. R. 642; 4 T. R. 557; 1 Tidd. Prac. 663, 7th edit; 2 Arch. Prac. K. B. 1.

- [40] 2. LEE v. CARLTON. E. T. 1790. K. B. 3 T. R. 642. S. P. HARBORD v. PERIGAL. E. T. 1791. K. B. 5 T. R. 210.

And Sunday is to be accounted as one of the days unless it happens to be the last. A declaration was signed on the 23d. and the defendant pleaded in abatement on the 26th. The plaintiff signed judgment as for want of a plea. It was objected that the judgment was premature, as the 25th was a Sunday.

Per Cur. Sunday can only be considered as one of the days when it is not the last of the limited number; when it is the last the defendant may plead in abatement the next day, otherwise the time usually allowed, would, under such circumstances, be circumscribed to three days. See R. E. 5 Ann. a, 7.

3. HUTCHINSON v. BROWN. E. T. 1797. K. B. 7 T. R. 298.

The days are computed only from the delivery, or when filed, from the notice of declaration. The defendant pleaded in abatement within four days from the service of notice of declaration, but not within four days from the time of its being filed. It was contended that as the declaration was filed *de bene esse*, the days were to be computed from the filing, and not from the notice.

Sed per Cur. In this Court there is no distinction between declarations *de bene esse* and in chief. In either case the filing is inchoate as concerns the defendant, until due notice has been given to him.

See Grey v. Saunders, Barnes, 248; Pr. Reg. 231; Ca. Prac. C. P. 111, S. C.; H. T. 1 Geo. 2; H. T. 2 Geo. 2, K. B.; 1 Geo. 2, Reg. 1, C. P.; 8 Mod. 379; 2 Lord Raym. 1407; 3 Burr. 452; 2 T. R. 112.

(N) RULE TO PLEAD, WHEN DISPENSED WITH.

BRANDON V. PAYNE. T. T. 1787. K. B. 1 T. R. 689.

The plaintiff is entitled to sign judgment when a defendant On a motion to set aside proceedings, it was shown that the declaration was

filed on the 7th of February. The plaintiff on the same day gave a rule to plead, but the notice of having filed the declaration was not delivered until the 8th; and on the 15th the defendant pleaded in abatement; on the 16th the plaintiff signed judgment. *Per Cur.* The defendant by pleading in abatement has dispensed with the necessity of having a rule to plead, and therefore judgment was regularly signed. Rule discharged. See Barnes, 284.

pleads in a
batement
after the
four days, al
though no
rule to
plead has
been given.

VII. PARTICULAR QUALITIES OF.

(A) MUST GIVE THE PLAINTIFF A BETTER WRIT.

1. SMITH v. MASON. M. T. 1728. K. B.; 2 Stra. 816; S. C. Lord Raym. 1541. S. C. MASON v. RUSSEL. 2 Lord Raym. 1178. HORSEPOOLE v. HARRISON. 1 Stra. 556.

The defendant was sued by the addition of a gentleman, and pleaded in abatement that he was a merchant, and not a gentleman. On demurrer to the plea a respondeas ouster was awarded, for the plaintiff has his election to sue him either by his name of degree or mystery, and plea in abatement should invariably give the plaintiff a better writ, and ought therefore to describe the addition by which he is to be sued.

A plea in a
batement
must invari
ably give
the plaintiff
a better
writ or bill;

See 4 Ed. 3. 137; 10 Ed. 3. 497; 5 Ed. 3. 144. 184; Yelv. 112; 1 Stra. 193; Cowp. 192; 4 T. R. 227; 8 T. R. 515; 2 B. & P. 125; 4 Taunt. 653; 1 East, 634; 6 East, 600; Bac. Ab. Misnomer, F.

2. OWEN v. BUTLER. T. T. 1697-8. 1 Ld. Raym. 345; Comb. 483. S. C.

In debt on bond oyer was craved; and from the condition it appeared that the defendant stipulated to pay three sums of money on three several days. The defendant pleaded in abatement that he had paid the two first instalments and that the last payment was not yet due. *Per Cur.* It should always appear from a plea in abatement that the plaintiff may have another action. Judgment that defendant answer over. See 1 Wils. 80; 1 Mod. 214.

And should
show that
plaintiff
may have
another ac
tion.

(B) MUST BE CERTAIN.

1. CHETHAM v. SLEIGH. T. T. 1681. C. P. 3 Lev. 67.

Per Cur. A plea in abatement ought to be certain to every intent. See 28 H. 63. a. pl. 11; 11 H. 6. 11. a; Co. Lit. 303 a; Cro. Jac. 82; Skin. 620; Goulds. 86; Cro. Eliz. 352; Willes, 42; 3 T. R. 186; 1 Com. Dig. Abatement, I. 11; 2 Saund. 209. b. n.

The plea
must be cer
tain to eve
ry intent;

2. MARSHALL v. BURNET. H. T. C. P. 1 Lutw. 15. n.

A plea in abatement ought to be pleaded strictly, and with precise exactness. See Carth. 207; 1 Show. 394; 5 T. R. 487; et supra.

And the
matter sta
ted with
precise ex
actness.

(C) WHEN TO BE TO THE WHOLE OR PART OF THE DECLARATION.

1. AYLWORTH v. WOOLLEY. H. T. 1714. K. B. 10 Mod. 286.

An action was brought in the Common Pleas on three several promises. The first for 55l. the second for 65l. and the third for 65l. The defendant pleaded as to part *non assumpsit*, and as to part in abatement; thus, viz. as to 50l. of the first promise, 60l. of the second, and 60l. of the third, and prayed that the writ might be quashed, because there were three actions depending in the Court of Exchequer for the same sums. Judgment of respondeas ouster was given in the Common Pleas.

A plea in
abatement
should an
swer to the
whole dec
laration.*

The Court of King's Bench, upon error brought, were of opinion that the judgment ought to be affirmed, as a plea in abatement must go to the whole and not to part of the declaration, and the three suits pending in the Exche-

* As a writ is divisible, and may be abated in part and remain good as to the residue, it must not be inferred from the above rule that a plea in abatement must invariably be pleaded to the whole declaration; for the defendant may plead in abatement to a part of the declaration, and plead another plea in abatement as in bar to the residue; or one of several defendants may plead in abatement, and the others in bar. The meaning of the rule is, that the whole matter of complaint alleged in the declaration must be answered by the plea or pleas pleaded; or the omission will amount to a discontinuance of the whole. (See Co. Litt. 303. a; 1 Balst. 116; Com. Dig. Pleader, R. 9; 1 Saund. 264. n.)

The principle has been thus illustrated. If the plaintiff in his action, brought either

quer might have been pleaded in bar of the whole. See 11 Co. 456; 1 Saund. 285. n; 1 id. 210; Ca. Temp. Hard. 273.

2. HERRIES v. JAMESON. E. T. 1794. K. B. 5 T. R. 553.

Where the matter goes only a part of the plaintiff's cause of action, the plea in abatement should be confined to that part.

This was an action of debt to recover 1066l. The first count was for 1000l. borrowed by the defendant from the plaintiff, and the second was 66l. for interest upon a certain other sum. The defendant prayed judgment of the writ, because the said sum in the said writ mentioned, and thereby supposed to be borrowed from the plaintiff, was borrowed of him by the defendant and five others (naming them) jointly, and not by the defendant only. To this there was a special demurrer, showing for cause that the plea, though pleaded in abatement of the whole demand, did not extend to both the causes of action, but only to one of them, and that the defendant had not pleaded in abatement of the declaration, but of the writ merely, and had nevertheless relied upon matter appearing only in the declaration, without showing any defect in the writ; and it was resolved by the Court, that as the plea professed to answer the whole declaration, and yet gave an answer only to part, it was therefore bad (see 1 Saund. 28. Earl of Manchester v. Vale, note 3); that the two sums mentioned in the two counts must be taken to be two distinct sums that were not connected with each other, for one was for money borrowed, and the other for the interest of another sum lent by the plaintiff; that if the second count could not be supported, the defendant should have demurred to it and not pleaded in abatement to the whole declaration for a defect in one count, but have pleaded in abatement to one count and demurred to the other; for a writ may be abated as to one count and remain good for the other, according to the resolution in Godfrey's case. 11 Rep. 45. b.

Though if the plea contains matter which goes only in part abatement of the writ, and concludes with a prayer that the whole writ may be abated, the Court will abate as much of the writ as the matter pleaded applies, if there be a plea to the other part of the declaration.

[43]

3. POWELL v FULLERTON AND POWELL, E. T. 1701-2, C. P. 2 B. & P. 420. This was an action of debt: the declaration consisted of five counts; and the first and second were upon bond, and the others upon simple contract; and the defendant upon the first and second counts, pleaded *non est factum*, and then proceeded thus: And as the writ of the plaintiff, and the declaration founded thereon as to the third, fourth, and fifth counts, the defendant prays judgment of the said writ and the said declaration, as to the said third, fourth, and last counts, and that the said writ and declaration, as to those counts, may be quashed, because he saith that the said several supposed debts or sums of money in the said third, fourth, and last counts respectively mentioned, if any such debts or sums of money ever accrued or were due and owing unto the plaintiff, were, and each and every one of them were and was due and owing from the defendant, jointly and together with one R. D., unto the plaintiff and not from the defendant F. only, and which R. D. is still living, to wit, at Westminster aforesaid, in the said county; and this the defendant F. is ready to verify. Wherefore, inasmuch as the said R. D. is not named in the said writ and declaration, the defendant F. prays judgment of the said writ and the said declaration, as to the third, fourth, and last counts thereof, and that the said declaration thereon founded, as to the said last mentioned counts, may be quashed. And on demurrer to this plea, it was objected that the plea ought not to have prayed judgment of the whole writ, because it goes only to these three last counts of the declaration; but the Court was of opinion that a general writ of debt is divisible, and may be abated in part and remain good for the residue. A joint tenancy of parcel shall not abate the whole writ, though the demand be of a thing entire as of a manor. Doc. Pla. 7. And though the party demand judgment of the whole writ, the Court may abate it in part only. Rast. Int. 108. c. 109. d. 233. For if the demand or petition of a plea be too large, the Court may abridge upon a general writ, such as debt, detinue, account, or the like; or on a certain and particular one, as *assumpsit*, trespass, case, &c. demands two or more things: and it appears from his own showing that he cannot have an action or better writ for one of them the writ shall not abate in the whole, but stand for so much as is good; but if it appears upon his own showing that he has a cause of action for all the things demanded, but the writ is not proper for one of them, and that he might have another in another form, for that then the whole writ shall abate. 2 Saund. 210. a. n.; 1 Chit. Pl. 444. 3d. edit.

it; and therefore they gave judgment that so much of the said writ as regarded the third, fourth, and last counts of the declaration, and also the third, fourth, and last counts of the declaration, shall be severally quashed.

(D) MUST NOT BE IN BAR AND IN ABATEMENT TO THE SAME MATTER.

HOLT V. MABBERLEY. T. T. 1735. K. B. Ca. Temp. Hard 135.

In an action of debt on bond, a motion was made for leave to plead *non est factum*, and coverture in the plaintiff; but the Court refused to grant the application, because one is a plea in bar and the other a plea in abatement. 1 Com. 5 Dig. Abatement, I.

A defend-
ant cannot
plead in bar
and in abate-
ment at the
same time
to the same
matter.

(E) MUST NOT BE DOUBLE.

TREVILLIAN V. SECCOMBE. M. T. 1688-9. K. B. 1 Show. 80; S. C. Holt, 543; S. C. Carth S; S. C. Comb. 162.

To an action on the case, the defendant pleaded in abatement that plaintiff had been outlawed in several distinct actions. Demurrer thereto; in support of which it was submitted that duplicity in a plea of this description is as objectionable as in a plea in bar. A plea in a
batement is
bad for du-
plicity.

[44]

Per Cur. You may as well plead several excommunications, although any one disables. Suppose one of the outlawries be ill pleaded, who shall have judgment. Judgment of respondeas ouster awarded. See 42 Edw. 3. 19; Het. 126; 2 Rol. 25; Hob. 249; Lutw. 1592; 3 Leon. 222.

2. DACRES V. DUNKIN. H. T. 1671. K. B. 2 Lev. 82; 3 Keb. 127. S. C.

The defendant pleaded in abatement that the plaintiffs, H. & P. had brought another action for the same goods, which is still pending; the plaintiff replied that H. and P. are dead; to which the defendant demurred, and suggested that the replication was double in assigning the death of two plaintiffs in abatement, when the death of one would be sufficient to abate the writ. But a plea
stating that
both plain-
tiffs are
dead is not
subject to
that objec-
tion, altho'
the death
of either
might be
sufficient to
abate the
writ.

Sed per Cur. This plea is not double. See Read v. Matteur, Ca. Temp. Hard. 286; 1 Chit. pl. 447. 3d. edit.; and post, tit. Misnomer.

VIII. FORMAL PARTS OF.

(A) TITLE OF THE TERM.

DOUGHTY V. LASCELLES. H. T. 1792. K. B. 4 T. R. 520. S. P. THRELKELD

V. GOODFELLOW. M. T. 1732. Ca. Prac. C. P. 78; S. C. Prac. Reg. 1.

When a declaration was delivered as of Trinity Term, before the essoign day of Michaelmas Term, which notice to plead within the four first days of Michaelmas Term, and the defendant within that time pleaded a misnomer in abatement; the plaintiff considering this plea in abatement as filed out of time, signed judgment. A plea in a
batement as
of a term
subsequent
to declara-
tion must
be entitled
either as of
the preced-
ing term, or
contain an
entry of a
special im-
parlance.

Per Cur. A plea of this description can only be received after a special imparlance, and that imparlance should be stated on the record; otherwise the plaintiff is entitled to sign judgment. Rule discharged. See 1 Salk. 367; 1 Wils. 261; 1 Bl. Rep. 51; 1 T. R. 278; 6 id. 373; 7 id. 218. 447. n. d.; 2 B. & P. 884; 2 M. & S. 484; 2 Chit. Rep. 27; 2 Saund. l. n. 2; ante, p. 36.

(B) COMMENCEMENT OF.

(a) Statement of the defendant's appearance.

ANON. M. T. 1683. C. P. 1 Lutw. 11. n.

A misnomer must be pleaded in proper person, and not by attorney, unless there be a special warrant of attorney. It should
not be alle-
ged that de-
fendant ap-
pears by at-
torney.

See 3 H. 6. 55; 8 H. 6. 9; 21 H. 6. 27; F. N. B. 63. A; Litt. Ent. 1 & 6; Hans. Ent. 119; Britton v. Gordon, 1 Lord Raym. 117; Cremer v.

* The modern practice is to state the appearance to be by attorney in those cases where the allegation would not contradict the import of the warrant of attorney, as in pleas to the disability of the plaintiff, &c.; but where the appointment of an attorney would be inconsistent with the nature of the defence, as in pleas to the jurisdiction, coverture, misnomer, or infancy, they should in general be pleaded in person, or in the latter case by guardian, or *prochein ami*. See 2 Saund. 209. b; Summary on Pleading, 51; 1 Chit. Pl. 494. 3d. edit.

[45]

Quare, whether quod venit et dicit, &c. is sufficient.

Semb. Venit without more is sufficient even on special demurrer; but the most correct way is to say, venit et defendit vim et injuriam.

Venit et dicit in a plea of ancient demesne is good on general demurrer.

Venit et defendit vim et injuriam quando, &c. is a full defence, and defendant cannot afterwards plead in abatement. *Semb.* overruled. Vide *infra*.

A plea without defence may be refused, but cannot be demurred to after acceptance.

[46]

Defence by the Court of Common Pleas, and not suable elsewhere; to this the plaintiff venit et dicit, or dicit only is well.

Dicit only is sufficient at the day of appearance, when

Wichett, id. 507; Gilb. C. P. 187. 3d edit.; Barnes, 90; Prac. Reg. C. P. 6; 2 Rich. Pr. C. P. 1; 1 Com. Dig. Abatement, 3. 17; and post, tit. Jurisdiction, Plea to; Misnomer; 3 Wils. 413; Willes, 41. n. c; 5 T. R. 487; 5 Taunt. 653.

(b) *When defence is to be full, and when half.*

1. JAY V. BOND. T. T. 1671. K. B. 1 Vent. 222.

In this case the entry was, quod defendens venit et dicit, &c.; and Hale doubted whether the defendant ought not to have made some kind of defence.

2. WALFORD V. SAVIL. M. T. 1683. C. P. 1 Lutw. 9.

Debt on bond against an administrator. Defendant pleads by attorney suum venit, and prays over the writ. Special demurrer; that the defendant has made no defence. Demurrer overruled, as many of the precedents contain only that allegation; but the proper mode is to say, venit et defendit vim et injuriam.

3. NORTH V. HOYLE. T. T. 1683. C. P. 3 Lev. 182. S. P. Admitted in SMITH V. FRAMPTON. M. T. 1693. C. P. 3 Lev. 405. HOLE V. BURGOIGNE. E. T. 1693. K. B. 3 Salk. 261. HAMPSON V. BILL. M. T. 1684. C. P. 3 Lev. 240. *contra*.

In ejectment, the defendant venit et dicit that the tenements were ancient demesne. General demurrer; it was contended that the plea was insufficient, as no defence was stated in support of the alleged exemption. Co. Lit. 127. was cited.

Per Cur. What is said in Co. Lit. is not absolutely to be so intended; for the precedents where ancient demesne is pleaded are sometimes with defence and sometimes without it; and they only prove that it may be pleaded with defence, but do not show that it cannot be pleaded without it. The plea is therefore good.

4. PENTIN V. JENKINS. E. T. 1691. K. B. 1 Show. 349. S. P. GAWEN V. SURBY. T. T. 1682. C. P. 1 Lutw. 5. HOLE V. BURGOIGNE. E. T. 1693. 3 Salk. 271.

In trespass for assault and battery, defendant venit et defendit vim et injuriam quando, &c. and pleaded alien enemy in abatement. Demurrer to plea; in support of which it was submitted that the plea was incorrect, as a full defence had been made.

The court inclined to this opinion and the plea was overruled.

See Co. Lit. 127; Bac. Ab. Pleas, D; 2 Saund. 209, c; 1 Lord Raym. 117; 1 Show. 387; Ra. Ent. 287; Co. Ent. 348; Ash. 389; Hardres, 304; Sty. 273.

5. FERRER V. MILLER. E. T. 1691. K. B. 2 Salk. 17.

Ejectment. The defendant venit et dicit that the land is ancient demesne, without making any defence. Special demurrer; et per Holt, C. J. the plaintiff might have refused the plea for want of a defence; but if he receives it he admits the defence, and cannot demur for that cause.

6. KIRKHAM V. WHEELY. 1694. K. B. 2 Salk. 543; S. C. not same point, 1 Ld. Raym. 27.

To an action *qui tam* the defendant pleaded that he was an attorney of Defence by the Court of Common Pleas, and not suable elsewhere; to this the plaintiff demurred, because there was no statement of venit, but dicit only.

Per Cur. Venit et dicit, or dicit only, is a sufficient defence in this case. See Stevens v. Squire, Carth. 363; *semb contra*, S. C. 5 Mod. 205.

7. STEVENS V. SQUIRE. 1694. K. B. Skin. 582.

The defendant pleaded in abatement, and commenced with dicit, without saying venit et dicit, or making any defence. It was argued, that dicit, without venit, might be *ore tenus*, &c. The objection was overruled, the defendant being in the custody of the Marshal, and before another day of contin-

uance; but if it were at another day of continuance after the day of appearance, it ought to be *venit et dicit*.

8. ALEXANDER v. MAWMAN. M. T. 1737. C. P. Willes, 40.

Action of assumpsit; the defendant in his plea "comes and defends the force and injury, when, &c." and prays judgment of the writ, because a co-executor appointed by the testator, and who had administered, had not been joined in the action. General demurrer. In support of which it was argued, that the defendant having made a full defence by defending the force and injury, when, &c. could not afterwards plead in abatement.

Per Cur. We agree, that if the defendant had made a full defence, he could not afterwards plead in abatement; but we are of opinion, that going no further than "defending the force and injury, when, &c." is not a full defence, and so it is expressly said in Litt. Sect. 195; and Co. Litt. 127, b; and it is there mentioned, that a defendant must make himself party by saying *respondit vim et injuriam quando*, &c. before he can plead to the disability of the person, or the jurisdiction of the Court; but that if he goes on, and says *et damna et quicquid quod ipse defendere debet*, &c. that amounts to a full defence, and after that he cannot plead a plea in abatement.

This is indeed said to be otherwise determined in the case of a plea of outlawry, 1 Lutw. 5, Gawen v. Surby, for there the defendant introduced his plea of outlawry with a *respondit vim et injuriam quando*, &c. and upon a demurrer a *respondeas* was awarded. And the case in Styles, 273, which was cited for the plaintiff in this case, was likewise there quoted as an authority for the judgment; but in that case there was no judgment given, but the matter was ordered to be spoken of again; and Lutwyche, at the end of the case in his Reports, seems to doubt its authority, for he says there is a multitude of precedents to the contrary in all the books of pleadings, and he cites many precedents which are all the same manner as the present. So we think, as Lutwyche did, that the case is not law. Judgment for defendant. See Bro. Ab. tit. Defence, pl. 3; Clift. Ent. 15, pl. 37; Brownl. Rediv. 199, 200. [47]

9. WILKES v. WILLIAMS. T. T. 1800. K. B. 8 T. R. 631.

Defendant to an action of assumpsit pleaded in abatement that he was a tipstaff of the High Court of Chancery, and alleged "that he in his own proper person comes and defends the wrong and injury, when, &c."

In support of a general demurrer to the plea it was contended, that the defendant should only have made a half, and not a full defence: that by defending the force and injury, the defendant waived all pleas of misnomer; by defending the damages, all exceptions to the person of the plaintiff; and by defending either one or the other when and where it should behove him, he acknowledged the jurisdiction of the court; 3 Bl. Com. 298.

Per Cur. The case of Alexander v. Mawman (*vide supra*) determined the point raised by this demurrer; and after the deliberate decision given on that occasion, it must be considered as at rest; the "&c." is only to be viewed as half defence in cases where such a defence should be made, and as a full defence where the latter is necessary.

See 2 Saund. 209, c; 3 B. & P. 9; 1 Chit. Pl. 415, 3d ed.

(C) SPECIAL VENUE.

1. STEPHENS v. SQUIRE, M. T. 1694, K. B. Carth. 362; S. P. NICHOLS v. SHEPHERD. M. T. 1694, Skin. 620.

To an action upon the case the defendant pleaded his privilege as a prothonotary's clerk in abatement, without stating any venue. The plaintiff demurred. *Per Cur.* The omission to insert a venue is a fatal defect. The question raised by plea is a matter of fact triable by a jury, for prothonotaries, in a plea of privilege a special venue must be laid; *sed*

* The practice in all cases, whether half or full defence be intended, is to state, "And the said defendant, by A. B. his attorney, or in his own proper person," comes and defends the wrong (or, in trespass, force) and injury, when &c. and says, if, however, the remaining part of the sentence, "and the damages, and whatever else that he ought to defend" be improperly inserted, the defendant cannot afterwards plead in abatement, as that allegation constitutes a full defence.

clerks are not enrolled; therefore it is necessary to lay a venue in such a plea.

2. *PIE v. COOPER*. H. T. 1704. K. B. 2 Lord Raym. 1243. S. P. JEVENS *v. HARRIDGE*, M. T. 1665. K. B. 1 Saund. 8; *ORD v. HOWARD*, E. T. 1694. K. B. 12 Mod. 125; *WEST v. SUTTON*, E. T. 1703. K. B. 2 Lord Raym. 853; S. C. 1 Salk. 2.

Aliter in a plea of alien enemy;
[48]

In an action on the case the defendant pleaded in abatement that the plaintiff was an alien enemy, and had no venue; and on demurrer it was adjudged that it was well pleaded, and that the plaintiff might have replied that he was born in England; but if such matter is pleaded in bar, it must be pleaded with a venue;* and the plaintiff might reply, that he was born in such a place in England. And in the principal case judgment was given, *quod bill a cassetur*. See *Freeman v. King*, 1 Sid. 357.

3. *LETT v. MILLS*, 1702, K. B. 6 Mod. 105; 1 Salk. 6; 2 Lord Raym. 1014, S. C.

Or if misad-
dition;

The defendant pleaded in abatement that *suscepit ordinem militare et jam miles existet*; and upon demurrer it was resolved, that no venue need be annexed to the averment that he was made a knight, because any thing which concerns the condition of the person ought to be tried where the action is laid.

4. *WILLIAMS v. DRURY*, T. T. 1694. K. B. 12 Mod. 195.

Or of misnomer;

Action of assumpsit, the defendant pleaded a misnomer in abatement, to which the plaintiff demurred, because the defendant had laid no venue.

But the Court held that it need not be stated in this case, because it is a plea concerning the person, and it must be tried where the action is brought.

5. *NEALE v. DE-GARAY*, E. T. 1797, K. B. 7 T. R. 243.

Or of non joinder; and if it be stated that the person not joined is alive, to wit, in Spain, the venue will be rejected as surplusage.

Action of assumpsit, plea in abatement that the supposed promises, if any, were made jointly with one B. and not without the said B. which said B. is still alive, to wit, in Spain, wherefore, &c. To this plea there was a demurrer, assigning for cause, that no venue within this kingdom was mentioned in the declaration where A. was living.

Per Cur. Where matter is pleaded in abatement which concerns the person no venue is required; for the principal is now clearly established, that the place laid in the declaration draws to it the trial of every thing that is transitory; and it should seem, that neither forms of pleading, nor ancient rules of pleading, established upon a different principle, ought now to prevail; and that since a defendant who pleads a matter arising in a foreign country, would be obliged to lay the same venue as laid in the declaration, the repeating that venue, or laying no venue at all, is a distinction without a difference. If the plea be good, notwithstanding the want of a venue, the alleging the fact stated in the plea as in a foreign country will not vitiate it; for the ground on which such an objection has prevailed is, that the stating a thing to have happened in a foreign country, without going on to say, to wit, in the parish of St. Mary Le Bow, or some such place, is, in effect, pleading a traversable fact, without alleging a venue for its trial; but when it is settled that no venue is necessary, the foundation of this second objection fails. Judgment for defendants.

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See 1 Vent. 264; 2 H. Bl. 161; Carth. 362; 1 Com. Dig. 22 tit. Abatement; 3 Lev. 113; 1 id. 149; 1 Keb. 816; 1 Sid. 234; 6 Co. 46, b; 2 Lord Raym. 853; 12 Mod. 125; 1 Saund. 8; Mod. Ent. 10; 1 Lutw. 699, 700; 2 H. Bl. 145; 3 Wils. 339; Cro. Jac. 96.

For matter apparent on the face of the writ the plea should pray judgment of the writ at

(D) PRAYER OF JUDGMENT AT THE BEGINNING OF THE PLEA.

1. *ANON*, M. T. 1682, C. P. 1 Lutw. 11.

In plea of misnomer the defendant did not demand judgment of the writ

* This difference is no longer regarded, a venue being now alike unnecessary as well in plea in bar as in abatement. See 2 H. Bl. 161; Cro. Eliz. 174, 124. 705. 842; Doct. Pl. 294; Carth. 326; Say. 22. 23; 1 Lutw. 345. 618; 2 Lutw. 1437; 1 Lev. 39; 3 id. 112; 1 Salk. 173; 2 Mod. 271; 1 Saund. 85. n. 1; Bac. Ab. Pleas, H. 5; Com. Dig. Plead. E. 4; and *see id.* G. 15; 1 Chit. Pl. 519.

in the beginning, but only in the conclusion of the plea; and it is observed by the reporter to be informal to do so in the first part of the plea, unless it be for a cause apparent on the face of the writ.

2. LEAVES v. BERNARD. M. T. 1694. K. B. 5 Mod. 132.

A plea in abatement is either to the writ or count; if the action is brought by original, the plea should commence *petit judicium de brevi*, and must conclude in the same words; if it is to the declaration, then it must be *petit judicium de billa et narratione*, for *billa et narratio* are the same

See 4 Bac. Ab. 50; 10 Mod. 112.

3. LEE v. BARNES. M. T. 1694. 5 Mod. 145; Holt, 3; S. C. Fitz. 256.

Per Holt, C. J. You may plead in abatement of a declaration where the action is by original, for the pleas then are different; but if the action is by bill, you cannot plead in abatement of the declaration, but only of the bill, for they are the same thing, and therefore the entry, in such case, is *petit judicium de billa*. See Lit. Ent. 1; Lutw. 1601; Ast. Ent. 11; 1 Salk. 297; 2 Ld. Raym. 10; id. 63; 2 B. & P. 420; 2 Saund. 209. b.

4. PICKERING v. SIMOND. E. T. 1731. K. B. Forts. 334.

Plea to an action of debt on a bond, that the original was taken out before the day of payment stipulated in the condition, without any introduction, but concluded *petit judicium quod breve cassetur*, held sufficient. ment in the condition without any introduction, but having a proper conclusion is good.

5. BOWYER v. COOK. M. T. 1694. 5 Mod. 146.

In a plea to the Jurisdiction of the Court, a prayer that the defendant respondere non debet is a good plea, or it may be *si Curia cognoscere velit*, &c. See Lill. Ent. 3, 6, 7, 9; Clift. 17. pl. 44; Lib. Plac. 4; Latch. 178.

(E) CONCLUSION OF THE PLEA.

1. JUSTICE v. WHITE. E. T. 1676. C. P. 1 Mod. 239. COLE v. GREEN. H. T. 1669. 1 Lev. 312. S. P. STUBBINS v. BIRD. H. T. 1674. C. P. 2 Mod. 63. CROSSE v. BILSON. H. T. 1702. 6 Mod. 103; S. C. 1 Salk. 3. S. C. Lilly, 351; S. C. Holt, 627; S. C. 2 Ld. Raym. 1016. S. P. WALLIS v. SAVIL. 1 Lutw. 42. JOHNSON v. ALTHAM. M. T. 1712. 10 Mod. 192. SLANNEY v. SLANNEY. T. T. 1700. 12 Mod. 524; S. C. 1 Ld. Raym. 694.

Debt against the defendant as executor to J. W.; the defendant pleaded that he was administrator and not executor, and concluded in bar. It was contended, on behalf of the plaintiff, that as the matter pleaded was only in abatement, and the conclusion being improperly in bar, the plaintiff was entitled to judgment. The Court concurring in this opinion, judgment was entered accordingly.

See 4 H. 6. 27; 36. H. 6. 17, 18; 1 Sid. 189; Bro. Brief. 236. 247; Doct. Pl. 285; 2 Saund. 209. d.; 1 East, 636; 2 Marsh. 303; 6 Taunt. 587.

2. CROSSE v. BILSON. H. T. 1702. K. B. 6 Mod. 102; S. C. 1 Salk. 3; S. C. Lilly, 351; S. C. 2 Ld. Raym. 4016, SLANNEY v. SLANNEY, T. T. 1700, 1 Ld. Raym. 694; S. C. 12 Mod. 524.

Per Cur. If a man plead matter in bar, and conclude in abatement, it shall be taken for a plea in bar, from the nature and reason of the thing; for the plaintiff can have no writ if he has not a cause of action; and therefore the Court will take the plea to be in bar. If one plead matter in abatement and conclude in bar, "*et petit judicium* whether the plaintiff actionem habere debet," though he begin in abatement, and the matter be also in abatement, yet the conclusion being in bar makes it a bar; and the reason is, because you admit the writ by concluding specially against the action.

See 37 H. 6, 24, n; 36 H. 6, 17, 18, n; 10 H. 7. 11; 3 H. 6, 1, n; Bro.

* The distinction formerly taken, that where matter in abatement apparent upon the face of the writ is pleaded, the plea should both begin and conclude with praying judgment of the writ; but that when the plea is founded on matter extrinsic, as misnomer, and the like, the plea should only conclude with the prayer of judgment, and not begin with it, no longer prevails; and in modern pleading the plea does not begin with praying judgment of the writ, &c. but merely concludes with that prayer.

ing.*
So if the plea is to the writ
and declara-
tion.
In suits by bill the plea should pray judgment of the bill only; for if it be *petit judicium de billa et narratione*, it is bad.
A plea that the original was taken out before the day of pay

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In a plea to the jurisdiction the prayer is, "if the defendant ought to answer," or, "if the Court will take cognizance."

If a plea which contains matter in bar only, conclude in bar, it is a plea in bar;

And if a plea which contains matter in bar only, conclude in abatement, it shall be deemed a plea in bar.

If death be pleaded, the prayer should not be non judicium de brevi et quod breve cassetur; but jud' si cur ulterius pro cedere velit.

Brief. 236, 247; Doct. Pl. 57; 2 Saund. 209, n. c. d; 10 East, 87-8; Bac. Ab. tit. Abatement, P; 1 Chit. Pl. 446. 3d. ed.

3. HALLOWES v. LUCY. T. T. 1682. C. P. 3 Lev. 121.

In trespass the death of one of four defendants was pleaded *puis darrein continuance and petit judicium de brevi et quod breve illud cassetur*. The plaintiff demurred, and the plea was adjudged ill in its conclusion, which ought to have been *petunt judic' ulterius providere rult*, and not *judicium de brevi et quod breve cassetur*, for it is in fact already abated by the death of the fourth defendant.* A respondeas ouster was therefore awarded for the insufficiency of the plea.

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A plea of popish recusant convict, should conclude *suspenderi non debet*. The conclusion of a plea, in all cases, decides whether it is a plea in abatement or in bar; and if a plea concludes in abatement although it contain matter in bar, it is a plea in abatement.

4. STURTON v. PIERPOINT. H. T. 1683. 3 Lev. 208.

Defendant pleaded in abatement by *petit judicium de brevi*, &c. for that one of the plaintiffs is a popish recusant convict, to which the plaintiff demurred; and it was urged on behalf of the plaintiff, and admitted by the Court, that the plea in abatement ought not to have concluded by *petit judicium breve*, because the writ is not abated thereby, but only suspended, and it ought to have been *suspenderi non debet*. See 3 H. 6, 55; 33 H. 6, 13.

5. CARNETH v. PRIOR. E. T. 1638. K. B. 1 Show, 4; S. C. Comb. 107.

Upon debate of this case (which the reporter says he little heeded), Holt, Chief Justice, took this difference upon 33 Hen. 6. c. 18. that a plea which concludes in abatement, though it begins in bar, is a plea in abatement; and that, *e contra*, a plea concluding in bar, though it begins in abatement, is a plea in bar. *Quod non fuit negat*. See Latch. 178; 2 Ld. Raym. 1019; 8 T. R. 186; 10 East, 87; 6 Taunt. 337; 2 Marsh, 299; and see the observations upon the above case of Carneth v. Prior, in Serjt. Williams's note to 1 Saund. 209, b; 1 Chit. Pl. 446. 3d ed.; Stephen on Pleading, 392.

6. HAGE v. SKINNER. M. T. 1680, 3 Lev. 29.

The defendant concluded a plea of outlawry of the plaintiff with a *hoc paratas est verificare*, instead of *prout patet per recordum*. Judgment for plaintiff.

7. FOWLER v. COOKE. M. T. 1694. K. B. 1 Salk. 297; S. C. 5 Mod. 136, 146; Carth. 363; Holt, 307.

To an action of assumpsit against defendant as executor, he pleaded *petit judicium in ipso ad billam prædict' respondere debeat quia dicit*, that administration was granted, and that he ought to be sued as executor and not as administrator, and concluded *petit judicium si ad billam prædict' respondere compelli debeat*, &c. The plaintiff demurred; and it was objected that the bill could not be abated under this conclusion of the plea which was rather to the jurisdiction of the Court and not to the bill; and the Court considered that as every plea ought to have its proper conclusion, they ought not to abate the plaintiff's writ or bill in this case, because the defendant had not prayed it. See Latch. 178; 4 T. R. 224.

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Unless it be a plea to the jurisdiction.

A plea of excommunication should conclude with a prayer that the suit should remain with out day, until, &c. In the prayer of judgment, *billa e*

8. BOWYER v. COOK, M. T. 1694. K. B. 5 Mod. 146; et vide supra.

When a man pleads to the jurisdiction of the Court, *si respondere non debet* is a good plea; sometimes it is *si Curia cognoscere velit*, &c. See 1 Went. 49; Ld. Raym. 63; 3 Bl. Com. 307.

9. BRADLEY v. GLYNNE, T. T. 1685, C. P. 1 Lutw. 19.

In debt on bond the defendant pleaded that the plaintiff was excommunicated, but did not conclude his plea *loquela remaneat sine die quosque*, &c. Judgment for plaintiff. See 3 H. 6, 55; 33 H. 6, 18; Cliff. Ent. 3, pl. 3; 11 pl. 28; 12 pl. 30; Latch. 178; 2 Ld. Raym. 1056, 1243; 1 Wentw. 58, 62, 75.

10. ROSIERE v. SAWKINS, E. T. 1699. K. B. 12 Mod. 399; 1 Ld. Raym. 593; S. C. Holt, 460.

In trespass by a master for the battery of his servant, *per quod servitium*, &c. plea *actio non*, because it did not appear that he was the plaintiff's servant at the time of the assault, concluding with a *petit judicium de billa e*,
* *Vide ante*, p. 2. and 8 & 9 W. 3. c. 11. that the suit does not abate.

quod billa casseter; the question raised by the Court was, whether the conclusion rendered this a plea in abatement or in bar. *et narratio* are the same.

Per Cur. In this Court *bill* and *narratio* are the same; judgment may therefore be demanded of the bill, and allege insufficiency in the declaration; and though such a plea as this ought not to be received, yet, as it has been accepted, a *respondeas ouster* may be awarded, for the defendant cannot assign it for error, such a judgment being advantageous to him, as we should be justified in giving final judgment. See 2 Saund. 46, 47; 5 Co. 396; Owen, 33; 8 Co. 59, a; Dy. 38.

11. *MOFFATT v. VAN MULLIGEN*, T. T. 1787, 2 Chit. Rep. 539.

To an action by an executor, defendant pleaded in abatement that the promises were jointly made with one A. B. and the present plaintiff, and prayed judgment that the declaration might be quashed, &c. Demurrer, that the defendant had improperly concluded his plea, as he should have prayed judgment, that the bill might be quashed. Joinder. Judgment for plaintiff on the demurrer, with liberty to the defendant to plead *de novo*.

12. *HIXON v. BINNS*, E. T. 1788, K. B. 3 T. R. 185.

Demurrer to a plea in abatement, which concluded with a prayer of judgment if the bill, and that the same might be quashed; the cause assigned was, that the defendant did not pray judgment of the bill. And the Court said, that the greatest precision was required in the prayer of judgment; and that as the defendant had not, in his plea of abatement, complied with the necessary forms, the plaintiff might take advantage of it on a special demurrer, and adjudged *quod respondeat ouster*. See 1 Salk. 289, 297.

13. *HERRIES v. JAMEISOV*, E. T. 1793, 5 T. R. 553.

In an action of debt to recover 1066*l.*, as expressed in the writ, the first count in declaration was for 1000*l.* borrowed by defendant of the plaintiff and the one J. M. whom the plaintiff had survived; the second count alleged, that the defendant was indebted to the plaintiff in the further sum of 66*l.* for legal interest due and payable from the defendant to the plaintiff upon a certain other sum of money before that time lent and advanced by the plaintiff and J. M. &c. The defendant pleaded in abatement, and prayed judgment of the writ, because the said sum of money in the said writ mentioned, and thereby supposed to be borrowed from the said plaintiff and J. M. in his life-time, was borrowed of them by the defendant and five others jointly, and not by the defendant only, as by the said writ is above supposed. The defendant demurred; and assigned for causes, that the plea, although pleaded in abatement of the whole demand of the plaintiff, did not apply to the whole of the money above demanded by him; that it did not extend to both the causes of action above mentioned, but only to one of them; and that the defendant had not pleaded in abatement of his writ merely, but had relied upon matters appearing only in the declaration or count, without showing any defect in the writ. Judgment *quod respondeat ouster*.

14. *POWELL v. FULLERTON*, E. T. 1801, C. P. 2 B. & P. 420.

Plea to the third, fourth, and last counts of a declaration in debt for 5000*l.* praying judgment of the writ and declaration as to these counts, and that the said writ and declaration founded thereon as to these counts might be quashed. Demurrer and joinder.

Per Cur. In support of this demurrer it has been contended, that the plea demands that the whole writ shall be abated, whereas the matter pleaded only applies to a part of the writ; but it is quite clear, that if the demand of a plea be too large, the Court may abridge it, according to the maxim *nam omne majus continet in se minus*. A general writ is divisible, so that it may be abated in part and remain good for the residue. Judgment, that the said counts be quashed, and plaintiff may, at his peril, prosecute for the residue.

See Rastall's Entries, fo. 108, b. 109, a. 126, 256, a. 233; Weeks v. Peach, 1 Salk. 179; 1 Hen. 5, fol. 4, b. pl. 5; Godfrey's case, 11 Co. 45, b; Clift, Eat. 4, pl. 6; p. 7, pl. 17; Herries v. Jameison, 5 T. R. 553.

15. GODSON v. GOOD, E. T. 1816, C. P. 6 Taunt. 587; 2 Marsh. 299, S. C.
 A plea containing matter in bar, but commencing and concluding in a statement is a plea in abatement and not in bar. Defendant pleaded to an action of assumpsit, that the promises, if any, were jointly made by his intestate and sixteen others. The plaintiff traversed the plea, and the defendant joined issue upon the traverse. Evidence, that the intestate, and above fifty others, had resolved to choose the plaintiff their attorney, and all and every one of them had resolved to participate in bearing the expenses. The plaintiff not having proved any distinct proportion of his costs to be payable by the intestate, a verdict was entered for him, with one shilling damages, with leave for the defendant to move to enter a nonsuit, on the ground that the plea did not give a better writ; and that as matter in bar appeared on the record, although it were pleaded in the form of a plea in abatement, it would operate as a plea in bar, there being evidence of other joint contractors.

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Per Cur. The cases cited by the defendant in support of this plea being a plea in bar, although it commenced and ended in abatement, are inapplicable. They only established that a plea containing matter in bar and concluding in abatement, or containing matter in abatement and concluding in bar, are to be viewed as pleas in bar. This is therefore a plea in abatement; and as such is disproved, the plea must mean that there were sixteen other joint contractors, and no more, which is not the case; it is therefore bad. Had it been even pleaded in bar, we should have had difficulty in saying it was proved. Rule discharged.

See *Rice v. Shute*, 5 Burr. 2613; *Cole v. Green*, 1 Lev. 311, 312; *Medina v. Staughton*, 1 Lord Raym. 594, cites 1 Sid. 189, 190; *Evans v. Stevens*, 4 T. R. 225; *Stubbins v. Bird*, 1 Mod. 214; 2 Mod. 63; *Abbott v. Smith*, 2 Bl. 951; 37 Hen. 6, 24, a; Bro. Brief. 236; 37 Hen. 6, 18, a; per *Lytleton*, Bro. Brief. 247, S. C.; *Cross v. Bilson*, 2 Lord Raym. 1018; *Wallis v. Savil*, 6 Mod. 103; S. C. 1 Lutw. 42; *Isam v. Hitchcock*, Cro. Eliz. 202; *Justice v. Whyte*, 1 Mod. 239; *Slanney v. Slanney*, 12 Mod. 524, 525; *Carneta v. Prior*, 1 Show. 4; Comb. 107, S. C.

16. ARTWOOD v. DAVIS, M. T. 1817, K. B. 1 B. & A. 172.

A plea in abatement to proceed by bill praying judgment of the writ and declaration is bad. In an action of assumpsit by bill, the defendant pleaded in abatement, and prayed judgment that the writ and declaration might be quashed. Demurrer, that the defendant had prayed judgment of the writ and declaration instead of the bill and declaration. For the causes stated in the demurrer, judgment *quod respondeas ouster* was awarded; and *Bailey, J.* said, that upon pleas in abatement the court will give no other judgment than that prayed for by the party. See *Hixon v. Binns*, 3 T. R. 185; the *King v. Shakespeare*, 10 East, 287; *Saund. 209, n.*

(F) SIGNATURE OF COUNSEL.

Judgment may be signed where a plea in abatement is filed with out counsel's signature.

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At common law, when the defendant pleaded a foreign plea, he was obliged to make oath of the

ANON, M. T. 1760, C. P. Prac. Reg. 282.

Per Cur. If a plea in abatement be filed without counsel's signature being subscribed thereto, the plaintiff is entitled to treat the plea as a nullity, and may sign judgment. See 1 Tidd, 664, 699, 7th ed; *De Normanville v. Meyer*, 1 Chit. Rep. 209; Gen. Reg. 18 Car. 2; and post, tit. Misnomer.

IX. AFFIDAVIT IN VERIFICATION OF.

(A) WHEN REQUISITE.

1. CHOLMLY v. BROOM, E. T. 1691, K. B. 3 Salk. 173; S. C. Carth. 402; 12 Mod. 123.

Debt against the defendant upon a bond sealed and delivered at Chester. The defendant pleaded that he was an inhabitant of Chester, and at the time of the action brought lived in Chester, &c. The plaintiff considering this to be a foreign plea, and that it ought to have been sworn, signed judgment; but it was set aside; for,

Per Cur. A plea to the jurisdiction is no foreign plea, nor a plea of privilege, nor of ancient demesne, these pleas are never sworn. A foreign plea is where the defendant by his plea would remove the cause of action out of the

county where the plaintiff has laid it, but it is not a foreign plea where the defendant adopts the place and county mentioned by the plaintiff.

See 1 Saund. 98, n. 1; Styles, 435.

2. *SHERMAN v. ALVAREZ*, M. T. 1725, K. B. 1 Stra. 639; S. C. 2 Lord Raym. 1409.

In an action by original, the defendant, after oyer, pleaded in abatement that the writ had never been returned; it was moved by the plaintiff's counsel to set the plea aside, it not being verified by affidavit.

Per Cur. When the party demands oyer, it is only oyer of the writ; whether it be returned or not is a matter of fact. But as the plea is not verified by affidavit it must be set aside.

3. *STILES v. MEAD*, H. T. 1726, K. B. 2 Stra. 733.

The defendant pleaded his privilege as a sergeant at law, with the writ annexed.

Per Cur. For want of an affidavit that he had business there, and there only, his plea must be set aside.

4. *PERRY v. TOMPKIN*, T. T. 1734, C. P. Prac. Reg. 5. S. P. *PEARCE v. DAVY*, T. T. 1756, K. B. 1 Kenyon, 365. *GRAY v. SIDNEFF*, E. T. 1803, 3 B. & P. 397.

A plea in abatement of the want of the defendant's addition of estate, degree, or mystery, was filed without an affidavit being annexed to verify the truth of the plea; judgment was consequently signed; and the defendant moved to set it aside, on the ground that the truth of the plea appeared by the declaration, and therefore an affidavit was not necessary. Rule to show cause granted. See *Hughes v. Alvarey*, 2 Lord Raym. 1409; 1 Com. Dig. Abatement, D. 6.

5. *REX v. GRAINGER*, H. T. 1765, K. B. 3 Burr. 1617.

On a motion to set aside defendant's plea to an indictment, and that judgment might be entered against him by default, as the prosecutor had, in consequence of the plea in abatement, lost the benefit of trial at the sittings after term, the objection taken was, that "the plea was a dilatory one, and not verified by affidavit;" nor had any probable matter been shown to the Court to induce them to believe that the fact stated in it was true.

Per Cur. It is usual to annex affidavits to pleas of this description in the Crown Office, and we do not see why they should not be annexed. Rule absolute for setting aside the plea.

6. *ONSLow v. SMITH*, E. T. 1801, C. P. 2 B. & P. 384.

In a writ of right, the tenant, who was seized of the estate for the term of his life only, prayed aid of him in reversion, but no affidavit was annexed.

Per Cur. Although a plea of aid prayer is not a plea in abatement, yet it is a dilatory plea within the statute 4 Anne, c. 16, and requires to be verified by affidavit.

7. *PHELPS, GENT. v. LEWIS*, T. T. 1801, Excheq. Forr. 144.

In *scire facias* against the heir and terre-tenants of A. the sheriff returned B. tenant of certain premises, whereof A. was seised in fee on the day of giving judgment or ever afterwards, and that there was no other tenant in his bailiwick whom he could warn, and that there was no heir,—the defendant pleaded that the plaintiff ought not to have execution, because there were other tenants of other premises (naming them) in the same county, whereof the said A. was seised in fee after the day the judgment was given, who were not returned tenants by the sheriff, and concluded his plea; wherefore he prays

* The statute 4 Ann. c. 16. s. 11. enacts, that no dilatory plea shall be received in any court of record, unless the party offering such plea do, by affidavit, prove the truth thereof, or show some probable matter to the Court to induce them to believe that the fact of such dilatory plea is true.

† Upon this ground it has been adjudged, that if an attorney plead his privilege of the same court as that in which he is irregularly sued an affidavit, to verify its truth need not be made (*Claridge, gent. attorney v. Macdougall*, T. T. 1806, cited 1 Chit. Pl. 452. 453.) because the Court, by examination of their own record, may ascertain the truth of the plea.

truth of it; but not of pleas to the jurisdiction or in abatement.*

A plea in abatement that the original is not returned must be verified by oath.

So must a plea of privilege as a sergeant.

But where the matter of the plea is apparent to the Court on a view of their own proceedings, an affidavit is not necessary.

[56] The statute of 4 Anne c. 16. s. 11. extends to criminal as well as civil cases.

A plea of aid prayer in a writ of right can not be pleaded without an affidavit; Or a plea in *scire facias* against terre-tenants that there is another terre-tenant not named.

judgment, if he ought to be compelled to answer the aforesaid writ of *scire facias*, in form aforesaid returned. This plea having been put in without an affidavit, the plaintiff signed judgment; and a rule being obtained to show cause why the judgment should not be set aside, it was argued against the rule by the plaintiff's counsel, that though this was not a plea in abatement, because that must give a better writ, and here there is no defect in the writ, but in the sheriff's return: and though the judgment of the Court, in case the truth of the plea is admitted, is not like the judgment on a plea in abatement that the writ should be quashed, but the plaintiff prays another writ to warn the terre-tenants that are omitted, which is granted returnable on a particular return, and a *dies datus* is given to the plaintiff, and the tenants returned in the former writ, to the day of the return of the said writ, yet it was clearly a dilatory plea, inasmuch as it does not go to the merits of the *scire facias*, but because all the terre-tenants ought to contribute equally, the plea prays that execution shall be delayed, and the merits of the *scire facias* postponed until all the terre-tenants are returned, warned, and brought before the Court, and therefore being a dilatory plea, required an affidavit within the statute of Anne, without which it was a mere nullity, and the plaintiff had a right to sign his judgment. And of that opinion was the whole Court, and discharged the rule for setting aside the judgment.

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(B) BY WHOM MADE.

LUMLEY v. FORSTER, M. T. 1739, C. P. Barnes, 344; S. C. Prac. Reg. C. P. 6. S. P. PEARCE v. DAVY, T. T. 1756, K. B. 1 Kenyon, 364.

The affidavit may be made by the defendant, or a third person.

The attorney had sworn to the truth of plea in abatement, and the question was whether the defendant should not have made the affidavit himself.

Per Cur. Probable cause is shown, which is all that is required by the statute. Rule to show cause why the plea should not be set aside, discharged.

See Lilley's Entries, 4.

(C) AT WHAT TIME TO BE MADE.

1. PEARCE v. DAVY, T. T. K. B. 1756, 1 Kenyon, 364; Sayer, 293, S. C.

Affidavit of truth of plea can not be sworn before plea is filed; *qu. vide infra*. But it may be sworn before declaration filed or delivered.

In an action of trespass for injuring a personal chattel, the defendant pleaded the nonjoinder of other parties interested, and annexed an affidavit of verification to the plea made by one of the defendants, which appeared to have been sworn after the writ was issued, but prior to the declaration being filed. *Per Cur.* Such an affidavit must be concomitant or subsequent to the plea, and cannot be sworn antecedent thereto.

2. LANG v. COMBER, M. T. 1803, K. B. 4 East, 348; 1 Smith, 108, S. C.

A rule to set aside an interlocutory judgment for want of a plea was opposed on the ground that the affidavit in verification of the plea was sworn at Liverpool on the same day that the declaration was filed in London, and consequently before the defendant could possibly have seen it, and that the plea founded thereon was a nullity. *Per Cur.* As the defendant might have had good reasons to believe that what he swore was true, and as in point of fact the affidavit did accord with the truth, and as the practice requires pleas in abatement to be put in within four days after filing the declaration, we think the plea is correct, and the rule must be made absolute. See Hopkinson v. Henry, 13 East, 170.

[58]

The affidavit must be properly entitled in the cause; And the substitution of the name of

(D) FORMS AND REQUISITES OF.

1. REX v. JONES, H. T. 1741, K. B. 2 Stra. 1161.

A plea in abatement to an information in the nature of a *quo warranto* was set aside, because the affidavit of verification was not entitled.

2. CLIXBY v. DINAS, M. T. 1741, C. P. Barnes, 348.

Defendant was sued by the name of *Finis Dinas*; he pleaded in abatement that his name was *Phineas*, and not *Finis*; but both the plea and affidavit to verify it were entitled. "In a cause between Clixby, plaintiff, and

Finis Dinas, defendant," rule to show cause why the plea should not be set aside was made absolute. *Finis for Phineas will render it invalid.*

3. PRINCE v. NICHOLSON, H. T. 1814, C. P. 1 Marsh. 70; S. C. 5 Taunt. 333.

This was an action against an executor for goods sold and delivered to the testator. The defendant in Trinity Term had pleaded non assumpsit, and at the trial had rendered a plea puis darrien continuance, stating that a judgment had been recovered against him as executor in a plea of debt for money borrowed by the testator in his lifetime. It was objected that the plea could not be received, as the affidavit to verify it was not entitled in the cause.

Per Cur. There was no occasion to entitle the affidavit at all, although it has been directed generally that every affidavit shall be entitled of the cause, in order that it may be identified in cases where it becomes necessary to bring an action or indict for perjury; yet that can make no difference in the present case, because the affidavit is annexed to the plea, and refers therefore to the title of the plea as if it were incorporated with it. *An affidavit however annexed to a plea, refers to the plea, and therefore needs not be entitled in the cause; see qu; vide supra et infra.*

4. RICHARDS, GENT. &c. v. SETREE, M. T. 1816, Ex. 3 Price, 197.

The defendant, an attorney of the Court of King's Bench, had been described in a venire facias ad respondendum as Stephen Richards, Gent. one of the six clerks of Benjamin Price, Gent., one of the sworn clerks in the office of Pleas in the Exchequer, and Charles Clarke. The defendant pleaded his privilege in abatement, to which an affidavit of verification was annexed. It was submitted on behalf of the plaintiff that the affidavit was a nullity, it being entitled in the cause of Stephen Richards, Gent. one of the six clerks of B. Price, Gent. one of the sworn clerks in the office of Pleas in the Court of Exchequer at Westminster, plaintiff, and Henry Setree, defendant, omitting altogether the name of the co-plaintiff, Charles Clarke. For the defendant the case of Prince v. Nicholson (*vide supra*) was cited. *But a mistake in the names of the parties to the suit renders the affidavit insufficient to support the plea, altho' it refer expressly to the party to which it is annexed.*

Per Cur. Whenever an affidavit is made in a suit that has been already commenced, it ought to be entitled as of the precise cause in which it is to be used. It has been urged that the Court of Common Pleas have received an affidavit without title, because the Court thought, by reference from the body of it, the title of the cause might be supplied by the one prefixed to the annexed plea; but even supposing that to have been rightly decided, it does not apply to the present case, for here a specific title is given to the affidavit, and that proves not to be the title of the cause. [59]

5. ONSLOW v. BOOTH, T. T. 1748, K. B. 1 Stra. 765; S. C. Forts. 341; and cited Sayer, 19.

A plea of privilege as a clerk to a prothonotary in the Common pleas was set aside, the affidavit annexed to it being, that "this is a true plea," and not that "the plea is true;" the statute requires that the affidavit should establish the fact and not the legality of the plea. *It should state that the plea is true in substance and fact, and not merely that the plea is a true plea.*

6. PEARCE v. DAVY, T. T. 1756, K. B. 1 Kenyon, 364; S. C. Sayer, 293.

Upon a rule to show cause why a dilatory plea should not be set aside, it appeared that the affidavit was not positive as to the truth of the fact pleaded, but there was something alleged in the affidavit from whence it might be fairly inferred that the fact pleaded was true. The rule was made absolute; Denison, J. and Wilnot, J. being of opinion that the affidavit was not sufficient. and by Denison, J. it has been said that it is sufficient under the 4. Anne, c. 16. if any matter be shown to the court by affidavit to induce them to believe that the fact stated in the plea is true; but the construction has always been that the affidavit must be positive as to every fact, for the words "probable matter" in the statute only extend to the matter of record, or some other collateral matter as to the truth of which there cannot be a positive affidavit. *It must be positive and explicit, and leave nothing to be collected by inference.*

Foster J. inclined to be of opinion that the affidavit was sufficient, inasmuch as it might be fairly inferred, from what was there alleged, that the fact pleaded was true.

(F) BEFORE WHOM TO BE SWORN.

HORSEMAN v. MATTHEWMAN, T. T. 1814. K. B. 3 M. & S. 154.

The affidavit annexed to a plea in abatement is not a nullity because sworn before defendant's attorney.

Per Cur. The defendant might have applied to the Court to set aside the plea, yet it not such a nullity as will authorise the plaintiff to sign judgment. See 8 T. R. Stra. 638. id. 705. 738.

(F) CONSEQUENCES OF THERE BEING NO AFFIDAVIT, OR OF ITS BEING DEFECTIVE.

1. *REX v. GRAINGER*, T. T. 1814, K. B. 3 Burr. 1616. *S. P. HUSSEY v. HUSSEY*, E. T. 1716. C. P. Comb. 260. *PETHER v. SHETON*, M. T. 1783, K. B. 1 Stra. 639. *SHERMAN v. ALVAREZ*, M. T. 1783, K. B. 1 Stra. 638; S. C. 2 Ld. Raym. 1409.

A rule was obtained, and, after argument, made absolute, to set aside a plea in abatement because no affidavit was annexed. See 2 Arch. Prac. K. B. 2.

2. *ONSLOW v. BOOTH*, H. T. 1752, K. B. cited *Sayer*, 19; and S. C. reported 2 Stra. 705; Forts. 341.

In the case of *Onslow v. Booth*, in this Court, a plea of privilege was set aside, although it was sworn generally that the plea was true, because it was not sworn that the particular facts therein alleged were true.

3. *WILSON v. PALMER*, M. T. 1725, Prac. Reg. C. P. 4.

The defendant was sued as executor, and pleaded in abatement that there was another executor, but did not annex an affidavit of the truth of his plea. The plaintiff signed judgment *Per Cur.* The judgment is irregular. See *Carth.* 402. 2 Ld. Raym. 1409; 1 Stra. 639; 1 T. R. 277. 689; 5 T. R. 210; 7 T. R. 298; 4 East, 348; 1 Tidd, 582. 7th ed.

4. *PHELPS v. LEWIS*, T. T. 1801, Excheq. Forf. 144.

To a scire facias against heir and ter-tenants of the recoveree, the defendant pleaded that there were other ter-tenants who were not returned, and prayed judgment "if he ought to be compelled to answer the said writ of scire facias;" but no affidavit in verification of the plea was annexed and the plaintiff signed judgment as for want of a plea. A rule nisi to set aside the judgment was obtained; but the Court after argument, in the course of which it was suggested that even if the plea required an affidavit, permission might be given to the defendant to enable him to make one, notwithstanding judgment had been signed, said, that when the plaintiff is delayed by the plea, it must be verified in a more solemn manner than in other cases. The defendant cannot be permitted to do that in this stage of the cause, as the plaintiff is now entitled to judgment; and when the defendant applies to set aside a regular judgment, he must lay some grounds.

X. AMENDMENT OF.

- DOCKARY v. LAWRENCE*, E. T. 1725. Ca. Prac. C. P. 39. *LYDE v. HEALE*, E. T. 1725, Prac. Reg. 21. *ATKINSON v. ———* GENT. ONE, &c. H. T. 1817, K. B. S. P. 2 Chit. Rep. 5.

A motion was made for leave to amend a plea in abatement by the insertion of the word "culpabilis" instead of "capitalis;" the mistake appeared to have arisen through a misprision of the clerk. *Per Cur.* The amendment of pleas in abatement has been generally denied, because they are dilatory, and do not go to the merits of the action; and it will be dangerous to make a precedent; the application must therefore be refused.

XI. EFFECT OF A PLEA IN ABATEMENT.

1. *RICH v. PILKINGTON*, H. T. 1689, K. B. *Carth.* 171.

Action on the case for a false return; plea in abatement; demurrer to plea and joinder, the plea having been holden bad; the counsel for the defendant must not propose to take exceptions to the declaration. *Sed per Cur.* After the de-

defendant has pleaded in abatement, instead of demurring to the declaration, he cannot be allowed to avail himself of any defect in the latter.

See 1 Salk. 212; Lutw. 1592; Willes, 478.

2. *OSBORNE v. HADDOCK*, E. T. 1737, C. P. Barnes, 257.

After the defendant had pleaded in abatement, the plaintiff, without leave of the Court, entered a *nil capiat per breve*, and then brought a new action. The Court held the proceedings to be regular, but said that a different rule applied to plea in bar. See Bac. Ab. Abatement, M; 3 Anst. 934; 1 B. & P. 40; 7 T. R. 698.

3. *KNIGHT'S CASE*, H. T. 1702, K. B. 1 Salk, 329; S. C. 2 Lord Raym. 1014; Holt, 255.

Case against Besaliel Knight by a wrong name. The defendant pleaded in abatement; the plaintiff, without proceeding further, brought a new action against the defendant by his right name, to which he pleaded another action pending. *Et per Holt, C. J.* The plaintiff should have discontinued the prior action, it will be too late to do it now, for the discontinuance will relate only to the time of its being entered on record, so that upon a *nil tiel record* it will be against him, for it was pending at the time of the plea pleaded. And this differs from a reversal of an outlawry or judgment by writ of error, for if *nil tiel record* be pleaded, and after that, but before the day given to bring in the record, the judgment is reversed on a writ of error, that reversal avoids the record *ab initio*, and it is a *defect de records*. See Doct. Pl. 11.

XII. REPLICATIONS TO.

(A) FORMS AND REQUISITES OF IN GENERAL.

1. *BISSE v. HARCOURT*, H. T. 1689, K. B. 3 Mod. 231; S. C. 1 Salk. 177; 1 Show. 155; S. C., cited Lord Raym. 339, 1053.

The plaintiff brought an action against the defendant for money had and received. The defendant pleaded an attainder of high treason in abatement, and consequently ought not to be compelled to answer the declaration. The plaintiff replied that after he was attainted, and before this action brought, he was pardoned, and concluded thus, *unde petit judicium et damna sua*. The defendant demurs, and stated for cause that the replication was improperly concluded, as the words *damna sua* ought not to have been inserted; and of that opinion was the Court, and a rule was made that he might be at liberty to discontinue the action without costs.

2. *BONNER v. HALL*, E. T. 1697, K. B. 1 Lord Raym. 338; S. C. Comb. 497; differently reported in Carth. 433; Holt, 557; S. P. MEDINA v. STAUGHTON, T. T. 1699, 1 Lord Raym. 592; S. C. 2 Salk. 210; CROSSE v. BILSON, H. T. 1702, K. B. 2 Lord Raym. 1022.

To an action of assumpsit the defendant pleaded in abatement that another action was depending in the Common Pleas for the same cause. The plaintiff replied negating that fact, and concluded *petit judicium de debito et damnis*. Demurrer and joinder. *Per Holt, C. J.* When a plaintiff takes issue upon a plea in abatement, he ought to pray damages; for if it be found against the defendant, final judgment shall be given. But where the plaintiff confesses and avoids the plea, and does not deny it, he cannot pray damages, but must maintain his writ. See Ra. Ent. 681; Co. Ent. 160, a.

3. *BISSE v. HARCOURT*, E. T. 1689, K. B. 1 Salk. 177; S. C. 3 Mod. 281; 1 Show. 155; Carth. 126, cited in Bonner v. Hall, 1 Lord Raym. 338.

The defendant pleaded an attainder of high treason in disability. The plaintiff replied a pardon, *et petit judicium et damna sua*; to which the defendant demurred; and the Court determined that the improper conclusion of the replication created a discontinuance; and that an ill prayer of judgment renders the plea a nullity. See Say. 46.

4. *SABINE v. JOHNSTONE*, T. T. 1797, C. P. 1 B. & P. 60.

To a plea of misnomer in abatement of the writ the replication prayed that

ception can be taken to the declaration.

After plea in abatement, plaintiff without leave of the Court may enter a *nil capiat per breve*, and commence a new action.

But the plaintiff cannot, after a plea in abatement of the pendency of a prior suit, evade the effect of the plea by discontinuing the first action, which was pending at the time of the plea.

[62] A replication confessing and avoiding the facts in the plea should not conclude with a demand of damages.

But a replication traversing any of the facts in the plea may pray judgment in chief.

If the replication prays judgment which the Court cannot give, it will create a discontinuance.

[63]

A replica-
tion to plea
in abate-
ment of the
writ, begin-
ing "that
the said
declaration
ought not to
be quash-
ed," is suf-
ficient; for
the first
part of the
sentence
may be re-
jected as
surplus-
age. The plain-
tiff may re-
ply that he
was made
denizen by
letters pa-
tent,
Or that he
was born
within the
ligeance of
the king sta-
ting the
place of his
birth.

the said declaration ought not to be quashed, as the defendant was and is known by the one name as well as by the other; concluding to the country. Special demurrer for not showing any reason why the said writ should not be quashed. Joinder in demurrer. *Per Cur.* Both the plea and replication are good. The replication is an answer by matter of fact, and not by matter of law. If that fact had been tried and found for the defendant, the judgment would have followed the prayer of the plea. The prayer of judgment at the beginning of the replication is surplusage. Judgment for plaintiff.

(B) TO PARTICULAR PLEAS.

(a) To a plea of alien enemy.

1. RICHFIELD v. UDAL, T. T. 1664, C. P. Carter, 48.

The plaintiff brought an action of debt as executor of A. C. The defendant pleaded that the plaintiff was an alien of the United Provinces in enmity against the king. The plaintiff replied that he ought not to be barred of having an answer; for that before the purchase of the writ he was made a denizen by letters patent, concluding with a verification. To this replication the defendant demurred; and on argument the validity of the replication was admitted.

See 9 E. & 4. 76; 3 H. 6, 55, a; 1 Com. Dig. Abatement, E. 4.

2. NICHOLS v. PAWLET, E. T. 1693, K. B. Carth. 302; S. C. 4 Mod. 285. S. P. FREEMAN v. KING H. T. 1666; Sid. 357.

The defendant pleaded in abatement that the plaintiff was an alien enemy, born in a certain place in France. The plaintiff replied that he is indigenii and born in a place described in the replication, and non alienigena modo, &c. and concluded to the country.

On demurrer the replication was holden ill, for the plaintiff did not rely upon the first part of it, that he was born in England, and conclude with an averment, so that issue might be taken by the other side, viz. that he was not born in England, and that the allegation might be triable with a proper venue; but here he had put alien or not alien in issue, which cannot be tried for want of a venue. Judgment that the bill shall abate. See Co. Lit. 129, b; 6 Co. 47; 7 Co. 26; Carter, 50; 1 Leon. 78, 79; Precedents, Ra. Ent. 252, 605; Ast. 11; Herne, 361.

[64] 3. WELLS v. WILLIAMS, M. T. 1696, C. P. 1 Salk. 46; 1 Lutw. 34; 1 Lord Raym. 282, S. C.

Or that he is residing in this country by the licence and under the protection of the king. If an alien enemy comes to this country *sub salve conductu*, he may maintain an action as an alien enemy in time of peace, per licentionem domini regis, and resides here sub protectione, and a war arises between the two states, he may nevertheless maintain an action, for the capacity to sue is but a consequential right of protection. See Calvin's case, 1760, 16; Forts. 221; Co. Lit. 1296; Precedents of replications, Petersdorff's Index, 18; 1 Chit. Pl. 568.

4. PIZ v. COOPER, A. T. 1704, K. B. 2 Lord Raym. 1245; S. P. GEORGE v. POWELL, T. T. 1717, K. B. Forts. 221.

In this case the defendant pleaded in abatement that the plaintiff was an alien enemy, and laid no venue, and on demurrer adjudged that it was well pleaded, and that the plaintiff might have replied that he was born in England generally. But if such a matter be pleaded in bar, it must be pleaded with a venue; and the plaintiff should reply that he was born in such a place, in England. And in the principal case judgment was given quod billa cassatur. See 2 Lord Raym. 853, 1014, 1173.

5. WEST v. SUTTON, E. T. 1702-3, K. B. 2 Lord Raym. 853; S. C. 1 Salk. 2; Holt, 3.

A *scire facias* being brought on a judgment in assize for the office of marshal, plea in abatement that the plaintiff was an alien enemy, *et hoc*, &c.; replication that he was born a subject at such a place in England, concluding with a verification. On demurrer, the Court said that the plaintiff should have concluded to the country, for alien born when pleaded in abatement is

Semb. no venue need be laid in such a replication; secus to a plea in bar.

The replication should conclude to the country;

triable where the writ is brought, and for that reason the replication must conclude to the country; the rule is otherwise where alien born is pleaded in bar; the replication should then conclude with a verification.

See Salk. 555; Cro. Eliz. 283; Stra. 9.

6. *TEXEL v. HOOPER*, M. T. 1695, Comb. 394; S. C. Forts. 222.

Per Holt, C. J. When alienee is pleaded in abatement, and the plaintiff replies that he was born within legiance, the replication may conclude to the country, or with a verification; but if pleaded in bar, the replication must conclude to the country; and this is the reason of the two precedents in *Rastal*,
Or with a verification;

(a) *To a plea of coverture.*

PEARSON v. HULSE, E. T. 1698, C. P. 2 Lut. 1638.

In assumpsit by a *feme covert*, after an imparlance had been obtained the defendant pleaded that after the writ issued the plaintiff married H. Replication, that after suing out the writ she did not marry H. *et hoc petit*, &c. To which the defendant demurred, because the replication did not affirm that the plaintiff was *sole*.
To a plea of coverture the plaintiff may reply that she is *sole*, and traverse the coverture.

In support of the demurrer it was contended that it ought to have been alleged in the replication that she was *sole*, and then have traversed the marriage with H. so that issue could have been taken on the affirmative in the defendant's rejoinder.
[65]

Sed Per Cur. It is the same in effect whether the issue be joined on the rejoinder or on the replication, for it is an affirmative and a negative to the plea and replication. It was submitted that by the replication the time of the marriage had been made parcel of the issue, for it being alleged that after the purchase of the writ she did not take husband, the allegation was improper; for if she married even before the purchase of the writ, the suit ought to be abated. *Sed non allocatur*: for the defendant by implication confessed that she was not married before the writ. Judgment for defendant.
And an allegation that she did not take husband after the writ cannot be objected to.

See Ast, 9, 19; Brownl. 203; 1 Com. Dig. Abatement, E. 6.

XIII. DEMURRER TO PLEA.

1. *CARTER v. DAVIES*, E. T. 1690, K. B. 1 Salk. 218; S. C. 1 Show, 255; Carth. 187; S. C. *BONNER v. HAEL*, E. T. 1696, K. B. 1 Ld. Raym. 338. *LUG v. GOODWIN*, M. T. 1697, K. B. 1 Lord Raym. 393. *ANON.* E. T. 1751, 1 Wils. 302. *MAYNARD v. HOPKINS*, T. T. 1752. Say, 46. *BOWEN v. SHAPCOTT*, T. T. 1801, K. B. 1 East, 542.

To an action of assumpsit, the defendant having pleaded the general issue to the first count, and in abatement to the others, the plaintiff demurred to the plea in abatement, concluding the demurrer in bar.
A demurrer concluding in bar to a plea in abatement occasions a discontinuance; but such a discontinuance would be aided by verdict.

Per Cur. The plaintiff having demurred in bar, where the plea is only in abatement, the suit is discontinued. But as issue had been taken on the other counts, the Court deferred proceeding on the demurrer, observing that the discontinuance would have been aided by verdict.

2. *ANON.* E. T. 1751, C. P. 1 Wils. 302.

The defendant pleads in abatement that there is no such person as the plaintiff in *rerum natura*; the plaintiff replies that there is, viz. at Westminster. Defendant demurs. Plaintiff joins in demurrer, and prays judgment and his damages, which being in chief is incorrect; for it ought to be that he may answer over. *Per Cur.* Let the proceedings be suspended, with leave to the plaintiff to move to amend on payment of costs.
Or the plaintiff may amend. (The demurrer should pray that the defendant might answer over.)

As to the proper prayer, see 2 Saund. 210, g. and precedents there referred to; and 1 Bac. Ab. Abatement, P. 1 Com. Dig. tit. Abatement, I. 15.

3. *MAYNARD v. HOPKINS*, T. T. 1752, C. P. Sayer, 46.

A demurrer to a plea in abatement concluded with praying judgment of the action. Upon a rule to show cause why the plaintiff should not have leave to amend the demurrer, by concluding it with a prayer of judgment of *respondeas* *consent*. *But* not without consent.
But the amendment was consented to upon payment of costs; and a rule

[66] was made for granting the indulgence. But it was by the express order of the Court inserted in the rule, that the amendment was made by consent.

4. *HASTROP v. HASTINGS*, E. T. 1691, K. B. 1 Salk. 212. *S. P. RICH v. PILKINGTON*, H. T. 1689, K. B. Carth. 171. *BELLASYSE v. HESTER*, T. T. 1696, C. P. Lut. 1592. *ROUTH v. WEDDELL*, H. T. 1702, C. P. Lutw. 1667. *BALLYTHORPE v. TURNER*, E. T. 1744, C. P. Willes, 478.

Upon a demurrer to a plea in abatement the defendant pleaded in abatement, *et pet' judicium de billa et quod billa prædict cassetur*, for uncertainty in the declaration. Upon demurrer the defendant's counsel insisted upon several defects in the declaration. *Et Per Cur.* The defendant cannot take advantage of mistakes in the declaration upon a plea in abatement; but if he would avail himself of them, he must demur to the declaration. A *respondeas ouster* was awarded. See 1 Bac. Ab. Abatement, P; 1 Com. Dig. Abatement, I. 14; 1 Chit. Pl. 457; 3d. ed.

5. *POWIS v. WILLIAMS*, M. T. 1697, C. P. Lutw. 1601.

Except where the matter pleaded in a demurrer is pleadable in bar. In an action of assumpsit by the plaintiff as executor for money had and received, the defendant pleaded in abatement the outlawry of the testator. Demurrer and joinder. In the course of the argument exception was taken to the declaration on account of some technical defect, and judgment was given for the defendant. The reporter introduces a *quære*, whether there is not a distinction between the present case and the decision in *Bellasyse v. Hester* (cited above,) because the outlawry was pleadable in bar.

See 1 Com. Dig. Abatement, I. 14, in which this difference is recognised.

6. *BATTERSBY v. MARSH*, M. T. 1702, K. B. 6 Mod. 80.

Demurring to the plea is a confession of its truth. The plaintiff in his bill styled himself a gentleman. Plea in abatement, that he was no gentleman; to which the plaintiff demurred. *Per Cur.* The plea is good being confessed by the demurrer.

7. *WALDEN v. HOLMAN*, K. T. 1712, K. B. 2 Ld. Raym. 1015; S. C. 6 Mod. 114; 1 Salk 6; Holt, 492, 563.

Objection may be taken to defects in matter of form on general demurrer. The plaintiff declared against the defendant by the name of John, who pleaded in abatement that he was baptized by the name of Benjamin, *absque hoc idem Johannes* was ever known by the name of John; and the plaintiff demurred generally.

Per Holt, C. J. Matters of form may be taken advantage of on a general demurrer when the plea is only in abatement, for the stat. of Elizabeth (the language of the statute of 4 Anne, c. 16, is precisely similar,) only means that matters of form in pleas which go to the merits of the action shall be aided on a general demurrer. Judgment, *respondeas ouster*. See 1 Salk. 194; 1 Ld. Raym. 327; 1 Tidd, 662, 7th ed.

8. *HIXON v. BINNS*, E. T. 1789, B. K. 3 T. R. 185.

[67] *Quære*, whether there are any exceptions to this rule. The plaintiff demurred to a plea of misnomer in abatement, because it did not pray judgment of the bill. *Per Cur.* As the defendant has not in his plea of abatement observed the necessary technical form, the plaintiff may take advantage of it on a special demurrer. Judgment, *quod respondeas ouster*.

9. *LLOYD v. WILLIAMS*, E. T. 1814, 2 M. & S. 484.

Semb. There is not. *Per Bayley, J.* It is never necessary to demur specially to a plea in abatement.

10. *ATKINSON v. —*, GENT. ONE, &c. H. T. 1817, K. B. 2 Chit. Rep. 5. A demurrer to a plea in abatement may be withdrawn. Application was made for leave to withdraw a demurrer to a plea in abatement. *Per Cur.* Pleas in abatement cannot be amended, but the demurrer may be withdrawn, and the plaintiff be at liberty to reply. Vide Tidd's Practice, 7th ed. 662, 741; Cas. Prac. C. P. 79; 6 T. R. 550-1; 8 id. 496.

When an issue in fact is joined up on the replication,

XIV. TRIAL OF.

1. *EICHORN v. LE MAITRE*, H. T. 1767, C. P. 2 Wils 367; S. C. cited *BOWEN v. SHAPCOTT*, T. T. 1801, K. B. 1 East, 543.

To a declaration in assumpsit the defendant pleaded misnomer in his Chris-

tian name in abatement, and upon issue joined, the jury found a verdict for the plaintiff, but neglected to assess the damages; a motion was afterwards made for a writ of inquiry; but against application it was said for the defendant, and agreed to by the Court, that the omission of the jury in not finding damages in this case could not be supplied by writ of inquiry, but a *venire facias de novo* must be awarded; for where a man may have an attaint, there no damages shall be assessed by the Court, if they be not found by the jury. In assumption, damages are the whole object of the writ and suit, though issue be joined upon a fact in abatement; yet as to the defendant it is conclusive to all intents and purposes, and involves the damages upon finding the fact against him; and if outrageous damages had been given, an attaint would have lain.

2. *WADE v. BIRMINGHAM*. H. T. 1820. K. B. 2 Chit. Rep. 5.

This was an action upon a judgment. Plea in abatement, and notice of trial given. A rule nisi was obtained to postpone the trial of the issue in order to procure evidence. *Per Cur.* Pleas in abatement being dilatory, the party pleading them must be prepared to go to trial promptly, and at the very first moment the case can be heard. Besides, even were this a case requiring an exception to be made to the general rule, the defendant's affidavit, which merely discloses—"that the defendant had come to his title since the judgment recorded against him in Ireland; that it was necessary for him, in order to support the plea in abatement, to procure the attendance of several witnesses from Ireland, for the purpose of proving his title to the barony of Atheltry; but those persons being in official situations in Dublin, it would be impossible for him to procure their attendance for the sittings after this term; and that he was advised by counsel that he was entitled to his privilege; and that he was now in the course of proceeding to establish his claim to the title of Baron Atherly by legal process," is insufficient. Rule dis.

XV. JUDGMENT.

(A) FOR PLAINTIFF.

(a) *On issue of fact.*

1. *ANON.* E. T. 1668, K. B. 1 Vent. 22. *AMCOTS v. AMCOTS*, E. T. 1664, K. B. Raym. 118; S. C. 1 Lev. 163. *MEDINA v. STOUGHTON*, T. T. 1699, K. B. 1 Ld. Raym. 593; S. C. 1 Salk. 210. *CROSSE v. BILSON*, H. T. 1702, K. B. 2 Ld. Raym. 1022. *BARKER v. FORREST*. M. T. 1735, 1 Stra. 532.

Per Cur. If the defendant plead matter of fact in abatement, and issue is joined therein, and tried and found against him, the plaintiff is entitled to final judgment. See *Thompson v. Collier*, Yelv. 112; 2 Wils. 367; 2 B. & P. 384; 1 East, 542; id. 636; 2 Saund. 210. g. 3.

2. *AMCOTS v. AMCOTS*, E. T. 1664, K. B. 1 Lev. 163; S. C. Raym. 118; Sid. 262.

Error on a judgment of formedon in remainder. The tenant pleaded infancy, and that the remainder descended to him. Issue was joined on the replication and found for the defendant, and final judgment signed.

It was contended for the plaintiff in error, that the judgment should have been a respondeas ouster, and not a final judgment; and that, although on an issue upon a dilatory plea, final judgment might be sometimes given, yet infants were not entitled to the exemption contended for; and the Court, concurring in the latter opinion, affirmed the judgment of the Court of Common Pleas.

3. *PUTT v. NOSWORTHY*, E. T. 1670, 1 Vent. 136, S. P. *BURDEN v. FERRERS*. E. T. 1663, K. B. Sid. 189. *COLE v. GREEN*. H. T. 1669, 1 Lev. 312. *WALLIS v. SAVIL*. H. T. 1700, C. P. 1 Lutw. 42. *CROSSE v. BILSON*, H. T. 1702, 1 Salk. 3; 2 Ld. Raym. 1016, S. C.; 6 Mod. 102, S. C.

Per Cur. If a man concludes a plea in abatement as in bar, and it is found against him, peremptory judgment shall be given. So if a plea in abatement be commenced in bar, *actio non* &c. the plaintiff will be entitled to final judgment.

- [69] ment. See *Carneth v. Prior*, E. T. 1688, K. B. 1 Show. 4; *semb. contra*, Latch. 178; Al. 17.

4 *EICHORN v. LE MAITRE*, H. T. 1767, C. P. 2 Wils. 367.

On an issue on a plea of misnomer that defendant is known by one name as well as the other the judgment is peremptory. Action on the case upon assumpsit for goods sold, &c. The defendant pleaded misnomer in his christian name in abatement. Replication that the defendant was called and known as well by the name of A. L. as by the name of B. L., and issue was consequently joined, and a verdict found for the plaintiff; but the jury did not assess any damages. Afterwards it was moved on the behalf of the plaintiff, that a writ of inquiry might issue to assess the damages, for that the defendant's plea being found to be false, the judgment to be given against him must be peremptory and final. On behalf of the defendant it was said that although in real actions, when issue is joined upon a dilatory plea and tried by a jury, the judgment shall be final, according to 1 Lev. 163; 1 Sid. 252; yet in a personal action, there shall be a *respondeas ouster*, and therefore a writ of inquiry of damages cannot be awarded. But

Per Cur. We are of opinion that the judgment must be peremptory; for there is no difference whether the issue be joined upon a fact in the plea in abatement, or in a plea in bar; for whenever a man pleads a fact that he knows to be false, and a verdict is found against him, the judgment ought to be final; for every man must be presumed to know whether his plea be true or false. But upon a demurrer to a plea in abatement, there shall be a *respondeas ouster*, because every man shall not be presumed to know the matter of law, which he leaves to the judgment of the Court.

(b) *On issue of law.*

When the plaintiff demurs to a plea in abatement and the plea is disallowed; the judgment is not final, but only that the defendant answer over. So on a demurrer to the replication. 1. *PUTT v. NOSWORTHY*, E. T. 1670, 1 Vent. 137. *COLLOP v. BRANDON*, E. T. 1678, K. B. Jones, 122. *THOMPSON v. COLIER*, M. T. 1688, K. B. Yelv. 112. *EIGHORN v. LE MAITRE*, H. T. 1768, S. P. 2 Wils. 367. *BOWEN v. SHAPCOTT*, 1800, K. B. 1 East, 543.

Per Cur. After the parties had joined in demurrer to a plea in abatement, the judgment is quod *respondeat ouster*, for joining in demurrer as upon a plea in bar is not material.

2. *MEDINA v. STOUGHTON*, T. T. 1699, 1 Ld Raym. 594.

Per Holt C. J. In a case upon a *scire facias* the Court have held that if the defendant pleads matter of fact in abatement, and the plaintiff replies and denies the fact, he may pray execution; but yet if judgment be given for the plaintiff upon demurrer to the replication, it should be only *respondeas ouster*. See *Collop v. Brandon*, 2 Show. 42; Jones, 122; et supra.

3. *AMCOTT v. AMCOTT*, E. T. 1664, K. B. 1 Sid. 252.

Semb. Upon a demurrer to a plea in abatement pleaded after the last continuance, if it be adjudged against the tenant or defendant, the judgment is final.

[70] Unless the plea be put in darrien continuance. 4. *CROSSE v. BILSON*, H. T. 1702, K. B. 6 Mod. 102, 11 Holt, 627; 1 Salk. 3; 2 Ld. Raym. 1016; S. C. Lilly, 351.

Where a defendant pleads in bar instead of in abatement final judgment will be given on demurrer. In replevin the plaintiff declared for taking his mare in quodam loco vocat, the king's highway, the defendant venit et defendit vim et injur., &c. Et us balivus, &c. bene cognoscit captionem equæ præd. in quodam loco voc. the king's highway, et juste, &c. quia it was the freehold of Lord Lemster, &c. absque hoc, that he took the mare in the place called the king's highway; et hoc, &c. unde pet judicium et return, &c. Plaintiff replies just. cognoscere non debet quia dic. quod cepit equam præd. in loco vocat. the king's highway, et hoc pet. quod inquiratur per patriam. Defendant demurs, and concludes unde ut prius pet. judic., &c. quodnam præd. cassetur. The plaintiff joins in demurrer; and judgment given in the Common Pleas for the plaintiff.

Per Cur. The judgment of the Common Pleas must be affirmed.

See 1. Vent. 137; Lutw. 197; Barnes, 351.

5. *CRÉMER v. WICKET*, E. T. 1699, 1 Ld. Raym. 550; S. C. 12 Mod. 350.

On a fail In trespass for an assault and battery the defendant pleaded in abatement

another action pending for the same cause. To which nul tiel record was replied, and habetur tale record rejoined, and the plaintiff signed final judgment as for want of a plea. *Per Cur.* Final judgment ought not to have been signed, but only quod respondeat ulterius, for failure of record is not peremptory.

6. *LAWRENCE v. MARTIN*, H. T. 1704. 1 Salk. 8.

An attorney was sued as administrator; he pleaded in abatement that he was an attorney of the C. B.; and a respondeas ouster awarded. The reporter states that notice need not be given of the judgment, for the defendant is supposed to be attending upon his cause in the paper, to maintain his plea. being awarded, notice need not be given to the defendant.

7. *DOCKMINIQUE v. DAVENANT*, T. T. 1703, 1 Salk. 220.

Per Cur. If a defendant demur in abatement, the Court will, notwithstanding, give a final judgment, because there cannot be a demurrer in abatement; for if the matter of abatement be extrinsic, the defendant must plead it; if intrinsic the Court will take notice of it themselves.

8. *MEDINA v. STOUGHTON*, T. T. 1699, 1 Salk. 211; 1 Ld. Raym. 593; 2 id. 1182 to 1205, cited.

The defendant concluded his plea petit judicium de narratione et quod narratio cassetur. The plaintiff demurred; and the Court, although they considered the plea, from the language of the conclusion of it, to be in bar, yet, as it was the safest course for the plaintiff, gave judgment that the defendant should answer over; saying that it could not be assigned for error by the defendant, because it was for his advantage.

9. *BOWEN v. SHAPCOTT*, T. T. 1801, K. B. 1 East, 543.

To an action brought in the Common Pleas, the defendant had pleaded a misnomer in abatement. To which the plaintiff had replied that she was as well known by one name as the other. To this there was a demurrer and joinder in demurrer, and the latter prayed judgment and award of damages. A writ of enquiry accordingly had been issued, the damages assessed, and final judgment signed. *Per Cur.* Where a fact is pleaded which is known to be false, and the verdict is given against the defendant, the judgment is final; but upon a demurrer to a plea in abatement there shall be a respondeas ouster. That rule governs the present case, which is that of a demurrer to a replication to a plea in abatement. Judgment of the Common Pleas reversed, and judgment of a respondeas ouster entered. See Gilb. C. P. 53, 186; 2 Wils. 367; 2 Saund. 40, 41, 210, g; Comb. 19; 4 Bac. Abr. 51; 12 Mod. 230; Hetl. 126; Com. Dig. tit. Abatement, I. 4 cites Th. D. 1 x. c. 1.

(B) FOR DEFENDANT.

[The judgment for the defendant on a plea in abatement, whether it be an issue in fact or in law, is, that the writ or bill be quashed; (Gilb. C. P. 52;) or if a temporary disability or privilege be pleaded, that the plaint remain without day, until, &c. Clift, 3; Lutw. 19; 2 Saund. 210.]

(C) PROCEEDINGS SUBSEQUENT TO A JUDGMENT OF *respondeas ouster*.*

1. *DOBERTZEN v. CHANCELLOR*, E. T. 1697, K. B. Carth. 447; 1 Ld. Raym. 329; 12 Mod. 189; 5 Mod. 399.

The defendant had pleaded in abatement, and upon demurrer a judgment of respondeas ouster had been awarded; he afterwards pleaded the general issue, and the plaintiff obtained a verdict. On a motion in arrest of judgment, the verdict was set aside, because an entry had not been made of the plea in

* After a judgment of respondeas ouster it has been supposed that there can be no plea in abatement, for if it were allowed there would be no end to such pleas. (4 Bac. Ab. entered on 51: Gilb. C. P. 186; 2 Saund. 40 41.) But the opinion must be understood as being the strictest referable only to pleas in abatement of the same degree, as popish recusancy and outlawry, or as well being both to the person; for it is clearly settled that the defendant may plead to the person of the plaintiff; and if this be overruled, he may afterwards plead to the form of the issue roll.

abatement and the proceedings prior thereto on the nisi prius record, but only of the plea in bar; consequently there was no plea roll to warrant the nisi roll; for upon the former (which was in court) it appeared that there had been proceedings and judgment given, upon a plea in abatement before the issue in bar was tried; but the nisi roll contained no statement of such proceedings, and therefore the Court could not identify them as documents in the same cause.

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But where the plea in abatement and the proceedings thereon had been omitted the Court held that the irregularity was waived by the plaintiff accepting the issue.

On a *respondeas ouster*, if the defendant's attorney does not pay for the copy of the issue, the plaintiff may sign judgment.*

The defendant is not entitled to costs where the plaintiff enters a nil capiat per breve.

[73] So on *scire facias*.

In the report of this case in 1 Ld. Raym. 329, the reason assigned for the decision of the Court is, that it was certified by the practitioners and officers of the Court, to be the invariable practice to have the plea in abatement entered on the nisi prius roll. See this case cited, *Harpur v. Davy*, Carth. 498.

2. *COMBE v. PITT*, E. T. 1765, K. B. 3 Burr. 1782; S. C. 1 Bl. Rep. 523. In this case the defendant had pleaded in abatement, to which the plaintiff had demurred, and no further proceedings were taken on the demurrer, but the defendant pleaded nil debet in bar. After verdict it was objected to the plea roll, in arrest of judgment, that it contained nothing but the declaration and the plea of nil debet; and that the proceedings on the plea in abatement were entirely omitted. It was contended that this irregularity would vitiate the whole; and that the acceptance of the issue (in which the plea in abatement was omitted) could not aid the defect. But *Per Cur.* The irregularity is cured by the defendant accepting the issue and paying for it. The objection ought to have been made at the time; it is too late to make it now.

See 2 Stra. 1131; Say. Rep. 154; Barnes, 475; 2 Wils. 160; 2 id. 243; 1 Chit. Rep. 237.

3. *ANONYMOUS*, M. T. 1701, K. B. 1 Salk. 5; S. C. 7 Mod. 51.

On a *respondeas ouster*, the defendant pleaded the general issue.

Per Cur. The plaintiff may sign judgment, if the defendant's attorney, on re-delivering back copy of the issue, will not pay for it; the old course was, to deliver in a copy of the whole record, viz. the declaration, plea in abatement, &c. and issue. The Court, in this case, ordered that a copy of the declaration and issue should only be paid for.

See 1 Ld. Raym. 329; 12 Mod. 119; 5 Mod. 339; Carth. 447.

XVI. COSTS.

(A) UPON A NIL CAPIAT PER BREVE.

1. *GREENHILL v. SHEPPHERD*, M. T. 1696, K. B. 12 Mod. 145, S. P. ALLEN v. MAXEY, M. T. 1784, C. P. Barnes, 120; S. C. Prac. Reg. 6.

Per Cur. If the defendant plead in abatement, and the plaintiff confess it, the plaintiff thereby saves costs.

See Hullock, 126; 1 Tidd, 666, 7th ed.; 2 Archbold Prac. C. B. 253.

2. *POCKLINGTON v. PECK*, M. T. 1738, K. B. 1 Stra. 638.

The defendant having pleaded in abatement to a writ of *scire facias*, the plaintiff moved for leave to quash the writ, which was granted without costs. And *per Cur.* It is the same in *scire facias* as in an action; when the defendant pleads in abatement, and the plaintiff's writ is abated, he pays no cost. See post, tit. *Scire Facias*; and *Hues v. Whitehead*, Ca. Prac. C. P. 74; Prac. Reg. 378; *Pool v. Broodfield*, Ca. Prac. C. P. 109; S. C. Prac. Reg. 378; Barnes, 431.

writ. Com. Dig. tit. Abatement. C. The order invariably to be observed in pleading is thus:—

1. To the jurisdiction.

2. In abatement.

1. To the person.

1. Of the plaintiff.

2. Of the defendant.

2. To the court.

3. To the writ.

1. To the form of the writ.

2. To the action of the writ.

3. In bar of action. (Co. Lit. 303.)

* But by a late rule of court. the issue money is to remain to be taxed as part of the costs in the cause. R. H. 35 Geo. K. B. 6 T. R. 218; 2 H. Bl. 551.

(B) UPON AN ISSUE IN FACT.

ALPIN V. CONSTABLE, T. T. 1727, Ca. Prac. C. P. 35.

A rule nisi was obtained calling upon the plaintiff to show cause why the costs of a nonsuit at the assize on an issue in abatement, should not be taxed. And the Court were clearly of opinion, that upon a nonsuit on such an issue, the defendant ought to have his costs; for if it had been found for the plaintiff, the judgment would have been peremptory, and he would then have been entitled to his costs. See *Welchen v. Le Pelletier*, 1 Chit. Rep. 632, n.

If there be a verdict for the plaintiff upon a plea in abatement, he is entitled to costs; or if the plaintiff be nonsuited, the defendant is entitled to costs.

(C) UPON AN ISSUE IN LAW.

THOMAS V. LLOYD, M. T. 1697, K. B. 1 Salk. 194; S. C. 1 Ld. Raym. 336. named THOMES V. LLOYD, Comb. 482; S. C. 12 Mod. 195. S. P. GARLAND V. EXTEND, M. T. 1702, 1 Salk. 194; S. C. 2 Ld. Raym. 992; S. C. 6 Mod. 8, S. P. ANON. T. T. 1700, K. B. 12 Mod. 523. ANON. H. T. 1700, K. B. 12 Mod. 609. APLIN V. CONSTABLE, M. T. 1726. Ca. Prac. C. P. 36.

In an action of assumpsit the defendant pleaded his privilege as an officer of the Exchequer in abatement, on which, the plea being held good upon demurrer thereto by the plaintiff, there was judgment, *quod billa casseler*. Afterwards, the defendant moved for costs upon the 8 & 9 W. 3. c. 11.* Neither party is entitled to costs on obtaining judgment on demurrer.

Sed Per Cur. This is not a case within the statute. The act only extends to demurrer in bar, and not in abatement, because it speaks of suits which are vexatious; and it is impossible for the Court to say, upon a demurrer to a plea in abatement, where the merits of the case are not disclosed, whether or not the action is either frivolous or vexatious; and it would be unjust to give the defendant costs in this case, because if the demurrer had been adjudged for the plaintiff, he would not have had costs against the defendant, but only judgment *quod respondeas oster*, and the right to costs in such cases ought to be mutual and reciprocal.

See *Barber v. Palmer*, 6 T. R. 524; *Nichols v. Earle*, 8 T. R. 395; 1 Tidd, Prac. 666, 7th ed; 2 Arch. Prac. K. B. 253; 1 Chit. Pl. 458; 3d edit.

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(A) WHAT MAY OR MAY NOT BE PLEADED, p. 74.

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(E) JUDGMENT, p. 79.

(A) WHAT MAY OR MAY NOT BE PLEADED.

1. LORD DOVER'S CASE, E. T. 1691, K. B. Comb. 189; S. C. 1 Show, 392. S. P. REX V. HAYDOCK, H. T. 1737, Sess. Ca. 315.

The defendant appeared at the bar with a writ of error, to reverse his attainder of high treason, and assigned for error that he was outlawed by the name of Henry Lord Dover, without any addition, and produced a patent, by which he was created Baron of Dover. The outlawry was accordingly reversed, and the defendant afterwards pleaded a pardon. See 6 Co. 53; 2 Hale, P. C. 175, 176, 238; Hawk. b 2, c. 34, s. 2; Bac. Ab. G. 2; 4 Bl. Com. 334; Style, 26, 109, 394; Andr. 146; and post. tit. Addition, Indictment.

2. REX V. SHERMAN, IDLE AND OTHERS, T. T. 1736, K. B. Ca. Temp. Hard. 303.

To an indictment for a misdemeanour, Idle pleaded a misnomer of his surname in abatement; and for the want of a replication on the part of the

* It enacts, "that if any person shall commence or prosecute in any court of record any action, plaint, or suit, wherein, upon any demurrer either by the plaintiff or defendant, judgment shall be given by the Court against such plaintiff, the defendant shall have judgment to recover his costs." &c.

† Duke or not duke, earl or not earl, baron or not baron, shall not be tried by the country, but by the record, and the writ testifying the plea pleaded must be shown, because it is a dilatory plea. Countess of Rutland's Case, 6 Rep. 53; 2 Hale, 240.

Want of the defendant's name of dignity; may be pleaded in abatement to an indictment; Or a misnomer in

the sur
name;*

crown, judgment was entered that he be dismissed and discharged from the premises specified in the indictment, and that he depart without day. The prosecution proceeded against the other defendants, who pleaded not guilty, and went to trial.

See 3 Hen. 6, 26; Staunf. Pl. 131, c. 18; Hale's Sum. 243; 2 Hale, Pl. 175-6; Hawk, b. 2, c. 25, s. 68; Layer's case, 6 St. Tr. 237.

3. REX v. SHAKESPEARE, T. T. 1808, K. B. 10 East, 83.

As that the defendant's name is Shakespeare and not Shakepeare and not Shakespeare. The defendant appeared by his right name, and pleaded to an indictment for a misdemeanor that his name was Shakespeare, and not Shakepear; and that he had always been known by the former designation.—Demurrer and joinder.—In support of the demurrer it was contended that the names were *idem sonans*, and that no misnomer had been committed.

Sed Per Cur. The introduction of the final e would perhaps be immaterial, but the omission of the s entirely changes the sound, and renders the two names perfectly dissimilar.

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4. SWAN AND JEFFEREY'S CASE, 1751, Fost. 104; S. C. 10 St. Tr. 36. S. P. REGINA v. GODDARD, T. T. 1702, 2 Ld. Raym. 922. REX v. STRATTON, M. T. 1799, 1 Doug. 239.

Semb. It cannot be pleaded to an indictment that another prosecution for the same offence is depending, though the proceedings might be quashed on motion.

John Swan and Elizabeth Jeffereys were indicted for the murder of ——— Jeffereys; Swan for giving the mortal wound, and Jeffereys for being present aiding and abetting; and both pleaded not guilty; but their trial was postponed to the next assizes.

In the mean time the attorney-general, who had received orders to prosecute at the expense of the crown, was satisfied, from the evidence laid before him, that Swan was in the actual service of the deceased at the time the murder was committed, or at least when the design was first laid. He therefore thought it advisable to prefer another bill against them for the parts they respectively took in the murder, charging Swan with petty treason, and Jeffereys with murder. Accordingly, at the next assizes, a bill was preferred in that form and found, and the prisoners were arraigned upon it, who pleaded in abatement, *ore tenus*, that another indictment was depending for the same offence, and pleaded over to the treason and felony. The counsel for the crown demurred, and joined *ore tenus*.

The prisoner's counsel insisted that they ought not to have been arraigned on the new bill pending the former indictment, on which issue was already joined; because if they pleaded to issue on the present indictment, they might be liable to be tried twice for one and the same fact; that it would be in the option of the crown, after issue joined upon both indictments, to proceed to trial upon either of them; and if the prisoners should be acquitted upon one, they might still be tried upon the other. For though *autrefois acquit* of murder might be a good bar to an indictment of petty treason for the same fact, or *autrefois acquit* of petty treason to an indictment of murder, yet the prisoners having pleaded to issue on both indictments, they might be told they came too late with their plea in bar, issue being already joined on this point. They therefore pressed that the trial on the first indictment might proceed before the prisoners should be called upon to plead to the second; for, said they, if the prisoners should be found guilty on that indictment, the ends of public justice would be fully answered: and if they should be acquitted, and the counsel for the crown should think proper to proceed on

* Formerly there was a distinction taken between the christian and the surname, but the former might, but the latter could not, be pleaded in abatement. 2 Hale, 175; Bac. Ab. Indictment, G. 2; Burn's Just. Indictm. XI. But this is now settled to be groundless; and an error in the latter is equally fatal with a mistake in the former. Rep. Temp. Hard. 308. Mistakes in the name must be taken advantage of by plea in abatement, and cannot be made the foundation of a writ of error, or motion in arrest of judgment. 1 Pac. Ab. Abatement, D.

† Hawkins, b. 2, c. 26, s. 63, says, that another information depending may be pleaded in abatement to an information *qui tam*, and cites Cro. Eliz. 261; 1 Roll. Rep. 49. 50. 134; but he says nothing on that point as to other informations. In b. 2, c. 34, s. 1, he says generally that another prosecution depending is no good plea to an indictment, as it is to an appeal or information; but he refers to the former passage, and therefore probably meant only *qui tam* informations. *Vide ante*, p. 21.

this new bill, the prisoners ought to be left at liberty to avail themselves of that acquittal as they should be advised.

With regard to the prisoner Jeffereys, the offence charged in both indictments they contended is exactly the same, as well in consideration of law as in point of fact; with regard to Swan, the fact in both is the same, and the substantial part of the charge, wilful murder of malice prepense; but falling under a different consideration in the second indictment, merely from the relation the prisoner is supposed to stand in to the deceased; and if that relation should not be made out in proof, yet still he might be found guilty of murder upon that indictment.

And, therefore, as the ends of public justice would be fully answered, with regard to both the prisoners, by trying them on the indictment of petty treason and murder, the Court proposed to the King's counsel that the first indictment should be quashed by consent, to which they agreed, which was accordingly done and the Court proceeded to the trial of the prisoners on the second indictment, on the issue of not guilty. See Cro. Car. 147; 1 Com. Dig. Indictment, L; 2 Hawk. P. C. c. 35, s. 1; 3 Burr. 1468.

(B) MANNER AND TIME OF PLEADING.

1. *REX v. WESTBY*, T. T. 1717, K. B. cited 2 Hawk, P. C. c. 34, s. 3.

Adjudged that a defendant appearing gratis, and by attorney, to an information, may plead a misnomer in abatement, as well as if he had appeared in proper person; for if he be not the person intended, the attorney-general may reject the plea, and sign judgment as on a nihil decit. But if he accepts the plea, he thereby admits him that pleads it to be the person concerned to make a defence; and therefore shall not afterwards say, that it doth not appear but that the plea might be put in by a stranger.

See 1 Salk. 59; 3 Mod. 266; Carth. 56.

2. *KINLOCH'S CASE*, 1746, K. B. Fost. 16.

Per Willes C. J. "An objection to an indictment in the nature of a plea to the jurisdiction, cannot be made on the issue of not guilty, nor can evidence in support of the objection be received upon that issue;" and the prisoners having pleaded not guilty, his lordship recommended that a juror should be withdrawn and that the prisoners should have leave to withdraw their plea of not guilty, and to plead the matter in abatement specially.

See Hale, P. C. 175; Harg. St. Tr. 237-8.

(C) FORMS AND REQUISITES OF PLEA.

1. *ORBELL v. WARD*, H. T. 1687, K. B. Carth. 54; S. C. 1 Salk. 59; 3 Mod. 267; S. C. cited 8 East, 107.

An appeal of murder was brought against A. B. of the parish of St. James, Westminster, in the county of Middlesex, Gent. The defendant demandedoyer of the return, and pleaded that there was a parish known by the name of "the parish of St. James, within the liberty of Westminster;" but no such place as "the parish of St. James, Westminster," only.

Upon demurrer to the plea, it was contended, that it being in abatement, the appellee ought to have pleaded over to the felony; (*Ward v. Brain*, Cro. Eliz. 694). The Court concurred in this opinion, and held that upon such a plea the defendant ought to have answered over to the felony, or a motion should have been made to the Court to compel the defendant to plead over, or the plea might have been refused; but that the omission to answer over to the substance of the charge did not render the plea demurrable, because the defendant might plead over to the felony after the plea had been determined against him. See 2 Hale, P. C. 238.

2. *VANDERCOMB'S CASE*, 1797, Old Bailey, 2 Leach, 712.

In this case the defendant pleaded *auterfois acquit*, without pleading over

* In general, advantage of any matter pleadable in abatement should be taken when the prisoner is arraigned. 2 Hale, P. C. 175.

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will order it to be done, and insert it at the bottom of the plea. The rule that the plea must answer over to the principal charge does not extend to misdemeanors.

to the felony; but the Court conceiving this to be absolutely necessary, the prisoner pleaded over to the burglary not guilty; and it was added to the plea in parchment.

3. *REX v. GIBSON*, M. T. 1806, K. B. 8 East, 107.

A rule had been obtained, calling on the prosecutor to show cause why the defendant should not be at liberty to plead not guilty to an indictment for an assault, which had been originally preferred against him at the sessions, and removed into the Court of King's Bench by certiorari. The defendant, it appeared, had pleaded a misnomer in abatement at the sessions, and a verdict had been found for the prosecutor. On showing cause against the rule it was holden, *Per Cur.* That the privilege of pleading over to the matter of the charge was only allowed in cases of felony; and that although the right was in such cases indisputable, and applicable to every species of felony, without any distinction, yet with regard to misdemeanors, only one instance could be cited of such privilege having been allowed;* that the exceptions in cases of felony were founded entirely in *favorem vitæ*, and on that ground the privilege was recognized by Lord Hale, 239, who derived it from the authority of the Year Books; (22 Ed. 4, 396; 9 H. 4, 16;) and has been on the same principle adopted by all the subsequent writers on the crown law. The books, by agreeing in considering felony as an excepted case, in effect exclude all other cases not also excepted. See Comb. 49; 11 St. Tr. 133; 2 Hawk. P. C. 123, 128; Poph. 115; 1 Rol. Ab. 273.

4. *REX v. DEAN*, 1787, Old Bailey, 1 Leach, 476; S. P. SWAN'S CASE, 1757, Fost. 104.

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Indictment of one by the name of T. D; plea by his counsel, *ore tenus*, that his name was J. and not T. D. Clerk of the arraigns replied, on behalf of the crown, that he was known as well by the name of T. as by the name of J. D. Issue joined. The jury returned a jury instanter, to try this issue, and it was found for the crown; upon which the prisoner pleaded over to the felony, not guilty. Dean's case, 1 Leach, 476.

5. *REX v. SHAKESPEARE*, T. T. 1808, K. B. 10 East, 82.

The plea of misnomer in this case concluded with a prayer of judgment of the said indictment; and that the defendant might not be compelled to answer the same. General demurrer and joinder. In support of the demurrer it was argued that the conclusion of the plea was improper, as the defendant ought to have prayed *quod billa cassetur*. In answer to this objection it was submitted, that praying judgment of the indictment was equivalent to a prayer that it should be quashed. *Per Cur.* We cannot on a plea in abatement, give such a judgment as may appear proper on the whole record, as we should be bound to do in the case of a plea in bar; (See 1 Saund. 97, n. 1; 3 T. R. 186; 1 East, 636; 4 East, 502-9; 10 East, 87; 2 Marsh. 303; 6 Taunt. 587; and ante, p. 49). In abatement the Court can pronounce no other judgment than the judgment prayed for by the party. The plea ought in strict accuracy to have been that the indictment should be quashed; but as it is sanctioned in its present form by Comyns, in his Digest, (Abatement, F, 18,) we must consistently with that precedent, adjudge the plea to be sufficient; and if the prosecutor be dissatisfied with this determination, he may bring a writ of error. See *Rex v. Mathew Westby*, E. 3 Geo. 1; Rol. 28, cited 10 East, 85, n.

* The case alluded to was the *King v. the Earl of Devon*, (Trem. P. C. 188.) which was on an information against his lordship for challenging Mr. Calpepper in the king's palace, and assaulting and wounding him there; to which he pleaded his privilege as a peer of parliament not to answer for such offence in any other than the court of parliament during its sitting; and for the usual time of privilege, i. e. for forty days after prorogation; and because the information was exhibited against him within the forty days, which were not then passed, he pleaded to the jurisdiction. To this there was a demurrer, and the Court gave judgment against the defendant to plead over to the information.

† In practice it is usual to have the plea engrossed on parchment, and signed by counsel, and delivered by the defendant in person, in open court, upon his being charged with the indictment.—C. C. C. 21.

(D) AFFIDAVIT OF VERIFICATION.

1 KINLOCH'S CASE, 1746. Fort. 17; S. C. 1 Wils. 157.

This was a trial at bar for high treason. The defendant pleaded to the jurisdiction, without an affidavit of verification being annexed to the plea. The attorney-general demurred, and no objection was taken to the omission.

2. *REX V. GRAINGER*, H. T. 1765, K. B. 3 Burr. 1617. S. P. *REX V. JONES*, H. T. 1741, K. B. 2 Stra. 1161.

On a motion to set aside the defendant's plea to an indictment, and that judgment might be entered against him by default, as the prosecutor by reason of this dilatory plea, lost the benefit of trial at the sittings after term, the objection taken was, that "the plea was a dilatory one, and not verified by oath," nor was any probable matter shown to the Court to induce them to believe that the fact of it was true. *Per Cur.* It is usual to annex affidavits to pleas of this description to the Crown Office, and we do not see why they should not be annexed. Rule absolute for setting aside the plea, for want of an affidavit. See *Com. Dig.* Indictment, L; *Hawk. P. C. b. 2. c. 34. T. 7*; *Arch. Crim. P. C. 47*; and 4 & 5 Anne, c. 16. s. 4.

Semb. Defendant may plead in abatement, on a trial at bar, without annexing an affidavit in verification of the plea; But in no other case can it be dispensed with.

(E) JUDGMENT.

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1. *THE KING V. SHAKSPEARE*, T. T. 1803, 10 East, 87.

Upon demurrer to a plea in abatement, found in favor of the defendant, the Court directed the following judgment to be entered up: "Whereupon all and singular the premises being seen and fully understood by the Court of our said Lord the King now here, and mature deliberation had thereupon, it is considered and adjudged by the said Court here, that he, the said Samuel Shakspeare, be not compelled to answer the said indictment, but that he depart hence without day in this behalf."

2. *REX V. JOHNSON*, T. T. 1805, 6 East, 602; S. C. 2 Smith, 591.

To an indictment for a libel the defendant pleaded to the jurisdiction of the Court of King's Bench that he was a native of Ireland, and that Ireland before the union was governed by its own laws, and not by the laws of Great Britain, and that since the union is yet governed by its own laws, &c. and that there always have been and now are courts and jurisdictions in Ireland distinct from those in Great Britain, and competent for the trial of all offences committed by the natives resident there, and that the defendant is a native of, and was resident in, Ireland, at the time of the offence alleged, and that the subject matter of the supposed libel related to things in Ireland. To this there was a general demurrer; and after argument, judgment was given against the defendant, when he was ordered to answer over instantler, or judgment to be entered against him peremptorily. See *Form of Judgment of respondeas ouster*, *Trem. P. C. 189*; 190; 1 East, 542; 2 Wils. 368.

The judgment on a plea in a abatement in misde meanors, is, that the defendant be not compelled to answer but depart the Court with out day. So when there is demurrer to a plea in a abatement it is, that the defendant answer over and not finally.

Abbreviations. See *tit. Attorney; and Style's Rep.* 182, c. 2. 227, c. 2. 290; and 4 Geo. 2. c. 26; 6 Geo. 2. c. 14. s. 5; and *post*, *tit. Forgery*.

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Abduction.

(A) AT COMMON LAW, p. 80.

(B) BY STATUTE, p. 80.

(C) — INDICTMENT.

(D) — EVIDENCE.

* Where an indictment for a capital crime is abated for a misnomer, the Court will not dismiss the prisoner, but cause him to be indicted *de novo*; (*Cro. Car.* 371-2; 4 Bl. Com. 329; *Hawk.* 62. c. 34. s. 2; 2 Hale, 176. 238; the Earl of Bontway's case, *St. Tr.* 51;) and, whether the offence be a misdemeanor or a felony, if the grand jury be not discharged, another bill may be immediately preferred against the accused. *C. C. C. 21*; 2 Hale, 176. 238; *Dick. Sess.* 167.

† But where there is a verdict against the defendant on an indictment for a misdemeanor, the judgment is final; (8 East, 107; 2 Wils. 367.) though in cases of felony the judgment in *favorem vite* is only that he answer over, 2 Hale, 239. 255; 2 Lord Raym. 922; Wils. 368; 1 East, 542; 8 East, 110.

(A) AT COMMON LAW.

REX v. LORD GREY, M. T. 1682, K. B. 3 St. Tr. 519; S. C. 1 East, P. C. c. 11. s. 10. p. 460.

An indictment at common law will lie for conspiring to take away a woman from her parents, and then seducing her

This was an information at common law against Lord Grey and several others, for conspiring and intending the ruin of the Lady Henrietta Berkley, then a virgin unmarried, within the age of eighteen years, one of the daughters of the Earl of Berkley, (she being under the custody, &c. of her father,) and soliciting her to desert her father, and to commit whoredom and adultery with Lord Grey, who was the husband of another daughter of the Earl of Berkley, sister of the Lady Henrietta, and to live and cohabit with him; and further, the defendants were charged, that, in prosecution of such conspiracy, they took away the said Lady Henrietta at night from her father's house and custody, and against his will, and caused her to live and cohabit in divers secret places with Lord Grey, to the ruin of the lady, and the evil example, &c. The defendants were found guilty, though there was no proof of any force; but on the contrary it appeared that the lady, who was herself examined as a witness, was desirous of leaving her father's house, and concurred in all the means taken for her departure and subsequent concealment. It was not shown that any artifice was made use of to induce her to leave her father's house; but the case was put upon the ground that there was a solicitation and enticement of her unlawful lust by Lord Grey, who was the principal person concerned, the others being his servants, or persons acting by his command, and under his controul. See *Rex v. Twistleton*, 2 Keb. 432; 1 East, P. C. c. 11. s. 9. p. 453; and a precedent, 3 Chit. Crim. 713.

(B) BY STATUTE.

The subsequent consent of the woman to her defilement, after a forcible abduction, will not take the case out of the statute 3 Hen. 7. c. 2.* nor is it necessary that she should be actually married or defiled, provided the original abduction was effected by coercion.

1. *REX v. BROWN*, T. T. 1672, K. B. 3 Keb. 193; S. C. 1 Vent. 243, 244. The prisoner was indicted on the stat. 3 H. 7. c. 2. for forcibly taking away and marrying the daughter of S. T. a city orphan in the custody of the chamberlain. The facts established in evidence were, that the prosecutrix was possessed of 5000*l.*; that she was menaced by the defendant, who was disguised in a mask, and carried away in a coach to Westminster; and the next day, by her own consent, but caused by the precedent menaces, she allowed herself to be married, but was not actually defiled, the defendant being interrupted in his designs; and, by direction of the Court, the defendant was found guilty, and afterwards received sentence of death, and executed. See 1 Hale, 660; 1 Hawk. P. C. c. 41. s. 8; Fulwood's case, Cro. Car. 485, 493; Swanson's case, 5 State Trials, 450; C. C. C. 530; for Precedents, see Petersdorff's Index, Crim. Div. p. 1.

2. *THE QUEEN v. SWANSON AND OTHERS*. M. T. 1701, K. B. 7 Mod. 101-2; S. C. Holt, 319; 5 St. Tr. 453.

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The prisoner by marrying a female after the abduction, and while under restraint is guilty of an offence within the statute, although he may not have assisted in the original abduction.

The defendants were indicted upon the stat. 3 Hen. 7. c. 2. The facts disclosed in evidence were, that the female was resident with her aunt, and that on the day stated in the indictment they were way-laid, and arrested in

* This act, after reciting that "whereas women, as well maidens as widows and wives, having substances, some in goods moveable, and some in lands and tenements, and some being heirs apparent unto their ancestors, for the lucre of such substances have been oftentimes taken by misdoers, contrary to their will, and after married to such misdoers, or to others, by their assent, or defiled, to the great displeasure of Almighty God, and contrary to the king's laws, and disparagement of the said women, and utter heaviness and discomfort of their friends, and to the evil example of all others," proceeds to enact, "That what person or persons from henceforth that taketh any woman so against her will unlawfully, that is to say, maid, widow or wife, that such taking, procuring, and abetting to the same, and also receiving willingly the same woman so taken against her will, and knowing the same, be felony, and that such misdoers, takers, and procurators to the same, and receivers, knowing the said offence in form aforesaid, be henceforth repented and adjudged as felons, provided always that this act extend not to any person taking any woman, only claiming her as his ward or bond woman."

The statute 39 Eliz. c. 9. s. 1. took away the benefit of clergy from persons charged with such offences; but now, by a recent act, 1 Geo. 4. c. 115. the 39 Eliz. c. 9. s. 1. is repealed, and persons convicted on stat. 3 H. 7. may be transported for life, or any term not less than seven years or imprisoned only or imprisoned and kept to hard labour, for any term not exceeding seven years.

a fictitious suit, and conveyed from Westminster, where they lodged, to the Garter Tavern, Drury-lane, and that the defendants there separated the aunt and niece from each other, and carried the latter to Holborn, where Swanson, the principal defendant, became her bail, and there married her while in custody. Baynton, one of the defendants, told her that if she did not marry Swanson she must go to Newgate.

The Court, in directing the jury, told them, that though the female might have had a regard for Swanson, yet, as she was not privy to the contrivance of coming out to him, and knew nothing of the scheme adopted by the defendants, and being married whilst she continued under that restraint and violence, though perhaps she consented to the marriage, the act itself was a crime within the statute; for here was a forcible taking away; and her subsequent consent, while under the restraint, could not be looked upon but as the effect of a continuing coercion; and that though Swanson had known nothing of the first force, yet he knowing her to be under restraint, and marrying while he knew her to be under it, made him an approver of the first of violence, and hence a participator in the general guilt.

2. THE QUEEN v. WHISTLER, H. T. 1701, K. B. 7 Mod. 132.

Per Powell, J. By the statute of 3 Hen. 7, c. 4, for stealing women, &c. all aiders and abettors are principals by the statute; yet there may be an accessory, as he who receives them after knowing them to be guilty, and this according to the known rules of common law. See 1 Hale, 661; 3 Inst. 61; 1 Hawk. P. C. c. 41, s. 9; 1 East, P. C. c. 11, s. 2, p. 442, 453; 1 Russel, 820; Fulwood's case, Cro. Car. 488.

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Persons who after the fact receive the offender, but not the woman are not principals within the statute.

4. LOCKHART AND LOUDON GORDON'S CASE, Cor. Lawrence, J. Oxford Lent Assizes, 1804, Russel, 821.

The two prisoners were indicted for the forcible abduction of Mrs. Lee, the prosecutrix, who was at the time of the commission of the offence living apart from her husband upon a separate maintenance of 900*l.* per annum. The two prisoners, it appeared had been received at the house of the prosecutrix as acquaintances, but Loudon Gordon had made overtures to her to be admitted to a more familiar intimacy; that he had not been expressly interdicted from renewing his requests on the subject or directly encouraged. On the day when the alleged offence was committed, the prisoners had been invited to dine with the prosecutrix; that Lockhart Gordon after dinner said that it was near seven o'clock, and that the chaise would soon be there, and he told the prosecutrix that she must go with Loudon that night. She considered this a joke, and observed that she knew of no preparation having been made for her leaving London. On her afterwards attempting to leave the room Lockhart Gordon said she should not, and placed himself against the door, and either at that time or soon after produced a pistol; she, however, after having rung the bell violently, got out at the door, and went up stairs, when she said to her female servant, "There is a plan to take me out of my house; they are armed with pistols; say no more, but watch." The footman was sent by the prisoners to call a coach, and during his absence, there being only female servants in the house, Lockhart Gordon laid hold of the female servants, and intimidated them by producing a pistol; when Loudon Gordon put his arm round Mrs. Lee's waist, and took her down stairs and out of the street door, when Lockhart immediately followed, and assisted in putting her in a chaise then waiting at the end of the street. Mrs. Lee stated, that though she remembered but imperfectly what took place at the time she was taken away, she was certain that she went from the house against her will, but that no manual force was used to get her into the chaise; she described herself as in a state of partial stupefaction, and witnesses stated that she was occasionally subject to a depression of spirits to such an extent as almost to amount to absolute mental alienation. It was then proved that the chaise was driven to Tetsworth, in Oxfordshire; and that during the journey, although she sometimes remonstrated, she made no appeal to the post-boy, or endeavoured to obtain assistance at the inns, turnpike-gates, or other places;

Where a woman is taken forcibly from one county to another, and is married or defiled with her own consent in the latter, the offence is not indictable in either county.

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that beds were prepared at Tetsworth; and after the prosecutrix had retired to her bed room, the chambermaid asked her when she should be in bed, and when the gentleman should come up, to which she replied, "In ten minutes;" that shortly after the chambermaid left the room, Loudon Gordon came to bed to her, and remained with her all night, and that the intercourse took place between them which usually takes place between husband and wife. The reason assigned by Mrs. Lec for this ready acquiescence was, that she was apprehensive that her life would have been endangered by a non-compliance, and that it would have created a scuffle at the inn, in which lives might be lost. Mr. Justice Lawrence, after inquiring of the counsel for the prosecution whether they had any further evidence to offer of force in the county of Oxford, and being answered in the negative, said he was of opinion that the case could not proceed any further; and addressing himself to the jury told them, that in order to constitute the offence with which the prisoners were charged, there must be a forcible taking, and a continuance of that force into the county where the defilement takes place, and where the indictment is preferred; that in the present case, though there appeared clearly to have been force used for the purpose of taking the prosecutrix from her house, yet it appeared also that, in the course of the journey, she consented, as she did not ask for assistance at the inns, &c. where she had abundant opportunities, and that as she was unable to fix time and place with any precision, this consent probably took place before the parties came into the county of Oxford, and that they must therefore acquit the prisoners. See Fulwood's case, Cro. Car. 465; 1 Hale, 660; 1 Hawk. P. C. c. 41, s. 9; 1 East, P. C. 11, s. 3, p. 453.

5. *REX v. TWISSELETON AND OTHERS*, M. T. 1643, K. B. 1 Lev. 257; S. C. 1 Sid. 337; 2 Keb. 432.

An offence is committed with in the 4 & 5 Ph. & M., c. 8. by secretly inducing a female under the age of sixteen to elope from her father's house and marry the prisoner without the consent of the former.

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Information on 4 & 5 Ph. & M. c. 8, s. 2,* that the defendants were used and accustomed to be entertained at the house of J. S. and that the defendant Twissleton induced his daughter (being his heir apparent to an estate,) to marry him, and that Twissleton and the other defendants conveyed her away from her father's house, and that the former married her without previously obtaining the parent's consent. On a trial at bar it was proved that the defendant Twissleton was a distant relation of J. S. of a small fortune, that he was in the habit of frequenting the house, and had paid his ad-

* The statute enacts, that it shall not be lawful to take or convey any maid or woman child unmarried, being within the age of sixteen years, from the custody and against the will of the father, or of such persons to whom he by his will or other act shall appoint or bequeath the keeping or education of such maid, &c. except such taking be had by or for her master or mistress, or guardian, in socage without fraud. Id. s. 2.

Every person above the age of fourteen years who shall unlawfully take or convey any maid or woman child unmarried, and within the age of sixteen years, from the custody and against the will of the father, mother, or persons who then happen to have, by lawful means, the education or governance of such child, shall, on conviction, suffer two years' imprisonment, or pay such fine as is imposed by the Star Chamber. Id. s. 3. (Star Chamber Dissolved, 16 Char. I. c. 10. s. 31.)

Every person who shall so take away, or cause to be taken away, and deflower any such maid or woman child, or shall against her will, or without the knowledge of her father, if her father is alive, or of her mother, having the custody of such child, if the father be dead, by secret letters, messages, or otherwise, contract matrimony with such maiden or woman child, shall being convicted, suffer five years' imprisonment; or pay such fine as is assessed by the Star Chamber, to go in moities to his Majesty and the parties grieved. 4 & 5 Ph. & M. c. 8. s. 4. The Star Chamber, justices of assize by inquisition or indictment, shall hear and determine the said offences; and the same process shall lie in such indictment, as on indictment of trespass at common law. Id. s. 5.

If any woman child or maiden, being above the age of twelve years, and under that of sixteen, consents to such person that shall so make any contract of matrimony against this act, her next of kin to whom the inheritance should descend after her death shall have all such lands and hereditaments as she had in possession, reversion, or remainder, at the time of such consent, during the life of the person so contracting matrimony; and after his decease shall descend to such persons as they should have done if this act had never been, other than to him who shall so contract matrimony. Id. s. 6.

This act shall not affect any custom or authority touching orphans within London, or any other city, borough, or town. Id. s. 7.

dresses to the young lady without the knowledge of the father, (who had designed her for another suitor,) but no evidence was produced of any extraordinary blandishments having been resorted to beyond the common gallantries; and it was shown that the young lady met the principal defendant by appointment, and that they were then married. The Court told the jury, that as the lady was under sixteen years of age, and possessed a large fortune, an offence had been committed within the terms of the information, and that they ought to find the defendants guilty. After some hesitation the jury returned a verdict conformable with this direction.

6. *REX v. MOOR*, M. T. 1678. K. B. 2 Mod. 128; S. C. 2 Lev. 179; 1 Freem. 444; 3 Keb. 708. 715; S. P. *REX v. MARRIOTT*, H. T. 1691. K. B. 4 Mod. 144; S. C. Carth. 263; 1 Show. 398.

The information charged that the defendant, being above the age of fourteen years, did take a young maid unmarried, and keep her three days, contrary to the form of the statute. &c. Upon this information he was found guilty. It was moved in arrest of judgment, that as the stat. 4 & 5 Ph. & M. c. 8. provided "that the defendant should pay such fine as shall be assessed in the Star Chamber," this court had not the power to impose the fine, because the information being founded on the statute the party must take the remedy as therein prescribed. In answer to this objection it was contended, that offences punishable in the Star Chamber are equally punishable in the Court of King's Bench, there being no negative words in the act to abridge the authority of the latter court, which is never restrained but when the statute directs before whom the offence shall be tried, and interdicts an inquiry from being instituted elsewhere. That it had been ruled, that where there is a prohibitory clause in a statute, and another clause which gives a penalty, if the party will go upon the prohibitory clause, he is not confined to the manner expressed in the act; but if he go for the recovery of the penalty, he must then pursue the mode directed by the statute. The first part of this statute is but declaratory of the common law; the second clause is introductive of a new law as to the Court of Star Chamber, but it does not restrict this court, which might have punished the defendant if there had been no legislative provisions. The first clause is prohibitory, viz. "that it shall not be lawful for any person to take away a maid unmarried;" and upon this division of the act the present information is brought. The second clause is distinct, and directs the punishment, viz. "upon conviction to suffer imprisonment for two years." By taking away the Court of Star Chamber this prohibitory clause is not repealed, a man may be indicted upon it without demanding the penalty; and the statute having directed that the offence shall be heard and determined before the king's counsel in the Star Chamber, or before the judge of assize, and there being no negative words to restrain this court; the chief justice, who is judge of assize in the county of Middlesex, may hear and determine the offence, and by consequence fine the party if he be found guilty.

Per Cur. This is a crime at common law: it is *malum in se*. (*Vide* 4 Mod. 126. *contra* and *post*.) But admitting it to be an offence created by the statute, there being no negative words to prohibit the interference of this court it hath a jurisdiction to punish the offence, even if the Star Chamber had not been abolished, for the party had his election to proceed here, or before that tribunal, upon the prohibitory clause. By the words "justices of assize" must be intended the justices of oyer and terminer. See 1 Sty. 162; Vaugh. 177.

7. *HICKS v. GORE*, M. T. 1684. K. B. 3 Mod. 84.

This was an action of ejectment to recover lands forfeited under 4 and 5 Ph. and M. c. 3. It appeared at the trial that the young lady to whom the property in question belonged had been placed, whilst under sixteen years of age, by her mother, her guardian under the protection of Lady G. and that Lady G. had, without obtaining the mother's consent, publicly married the young lady to her son. *Per Cur.* The statute was made to prevent children

An informa-
tion or in-
dictment
will lie in
the King's
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the 4 & 5
Ph. & M.
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of the latter
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is never re-
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tute directs
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tory clause
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prohibitory
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first part of
this statute
is but decla-
ratory of the
common law;
the second
clause is in-
troductive of
a new law as
to the Court
of Star Cham-
ber, but it
does not re-
strict this
court, which
might have
punished the
defendant if
there had been
no legislative
provisions.
The first
clause is pro-
hibitory, viz.
"that it shall
not be law-
ful for any
person to take
away a maid
unmarried;"
and upon this
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the act the
present infor-
mation is
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second clause
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"upon convic-
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court; the chief
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from being seduced from their parents or guardians by flattering or enticing words, promises, or gifts, and married in a secret way, to their disparagement; but nothing of the kind appeared in this case, for Dr. Hascard proved the marriage to be at St. Clement's Church, at a canonical hour, that many people were present, and that the church doors were open whilst the ceremony was performed. See observations on this case, 1 East, P. C. c. 11. s. 6. p. 547; 1 Russel, 831.

If the guardian once consents to the marriage he cannot afterwards retract; *qu.*

An illegitimate daughter under the care of her putative father is within the stat. 4 & 5 Ph. & M. c. 8.*

8. CALTHORP v. AXTEL, H. T. 1686. 3 Mod. 168.

In this case it was said that there must be a continual refusal of the guardian to accede to the marriage; for if he once agree though he afterwards express his dissent, yet it is an assent within the statute. (See 1 Hawk. P. C. 173; 1 Vern. 394; 2 Vern. 380.) In 1 East, P. C. c. 11. s. 6. p. 457. it is observed, that this was not the principal point before the Court, and required further confirmation.

9. REX v. CORNFORTH, H. T. 1741. K. B. 2 Stra. 1162.

The court granted an information against the defendants for taking away a natural daughter under sixteen years of age, under the care of her putative father, being of opinion that it was within the third section of the act of the 4 and 5 Ph. and M. c. 8. See 1 T. R. 96; 11 East, 20; 4 Geo. 4. c. 17.

(C) INDICTMENT.

[86]
Stating that the defendant being above the age of 14 years, took &c. is sufficient in an indictment on information on 4 & 5 Ph. & M. c. 8. s. 1.†

It is not necessary to say that the party was possessed of both lands and goods.

The party injured, if the force continue till the time of the marriage, will be a good witness against the offender, because she is not his wife *de jure*, and may

REX v. MOORE, M. T. 1675, K. B. 2 Lev. 179; S. C. 3 Keb. 798. 715.

The information charged that the defendant and others, being above the age of fourteen, took one A. then being a virgin unmarried, possessed of moveable goods, and seised of lands of great value, out of the custody of her mother, contrary to the form of the statute, &c. After verdict for the king, it was moved in arrest of judgment that the allegation, "being above the age of fourteen," was insufficient as the adverb must be taken to refer to the time of the information, not of the caption; as in the cases of forcible entry *existens liberum tenementum* refers to the time of the indictment, not to the time of entry. This objection was overruled, the Court observing that in those cases the *existens* follows the verb *ipsam disseisivit*, but here the *existens* precedes the verb *ceperunt*, and must, therefore, be taken to relate to the time of the caption. (S. P. Rex v. Boyall, 1 Burr. 842.) It was afterwards urged that the words *de rebus mobilibus* had been inserted in the information instead of *mobilibus*, and that its insertion had vitiated the information, but the Court said that the seisin of the lands is sufficient, without mentioning the goods.

(D) EVIDENCE.

BROWN'S CASE, T. T. 1672, 1 Vent. 243; S. C. 3 Keb. 193. S. P. SWENDSON'S CASE, 5 St. Tr. 456. FULDWOOD'S CASE, Cro. Car. 488. RAMSAY'S CASE, cited Rep. Temp. Hard. 83.

On an indictment on the stat. 3 Hen. 7. c. 2. it was doubted whether the evidence of the party abducted and forcibly married could be admitted, be-

* In Ratcliffe's case, 3 Co. 39. it was resolved, that a mother, notwithstanding her subsequent marriage, retains the guardianship of her child; she has in law the custody of her person, though the daughter has voluntarily left her several hours before the contract of marriage and the consent of the step-father is altogether immaterial, 3 Co. 39. b.

† The indictment of the offender under 3 Hen. 7. c. 2. must distinctly set forth that the woman abducted was possessed of lands or goods, or that she was heir apparent as well as that she was actually married or defiled, such statements being necessary to bring a case within the preamble of the statute to which the ensuing clause refers, by the legislature having adopted the words, "against her will." (6 St. Tr. 468; 7 Mod. 101. 112; Cro. Car. 43. 45. 489. 492; 1 And. 115; Say. 59; 12 Co. 20. 100. 110.) The plan and manner of the taking must also be expressly stated in the proceedings; (Cro. Car. 485;) and that the abduction was for *lucrum*. (Hob. 182.) But it is not essential to allege that the taking was with an intention to marry or defile the party, because this allegation is not required by the words of the act; nor would the absence of such intention lessen the injury. (Cro. Car. 480; 1 Hawk. P. C. c. 4. s. 6.) It is said, however to be both safe and usual to insert it. (1 Hale, P. C. 660.) See Precedents, Petersdorf's Index.

cause she was the wife of the defendant *de facto*, though not *de jure*; but the Court, *seriatim*, delivered their opinion that she was a competent witness, and observed, that as there was one continuing force upon the female from the commencement of the abduction till the marriage, whatever was effected during that violence could have no binding operation; and that from the nature of such crimes, if her testimony was rejected, the offence would frequently be permitted to pass unpunished. See *Rex v. Lord Audley*, 1 St. Tr. 392; *Perry's case*, Bristol, 1794, cited 1 Hawk, P. C. c. 41, s. 13; 1 East, P. C. c. 11, s. 5, p. 455; 1 Hale, P. C. 302; Sir T. Raym. 1; Hutt, 116; 2 Stra. 1202; 1 Burr, 543; Rep. Temp. Hard. 83; 2 Leach, 563; 1 Bl. Com. 413; Gilb. Ev. 120; Peaks, Ev. 174, 2d edit; 1 Phil Ev. 70, 3d edit; But. N. P. 286.

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Abettors. See tit. *Aiders and Abettors*.

Abeyance.

(A) OF THE FREEHOLD, p. 87.

(B) — A REMAINDER, p. 88.

(C) — DIGNITY, p. 90.

(A) OF THE FREEHOLD.

REX v. KEMP, K T. 1693, 4 Mod. 280.

Freehold lands are not allowed to be in abeyance except in particular cases, as permitting it would conduce to make fractions of estates, and prevent livery of seisin. See *Davis*, 34; *Rol. Rep.* 502; *Hob.* 153, 171, 338; *Plow.* 556; *Co. Lit.* 348; 1 *Co. Rep.* 131; 2 *Wils.* 165; 1 *Com. Dig.* Abeyance; 1 *Vin. Ab. Abeyance*; 2 *Bl. Com.* 107; 1 *Saund.* 260; 2 *Saund.* 382; *Fearn.* Rem. 41, post, tit. Lease.

The law does not admit estates to be in a beyance, except in cases of necessity.†

(B) OF A REMAINDER.

1. *PLUNKET v. HOLMES*, M. T. 1664, Raym. 28; S. C. 1 Lev. 11; 1 Sid. 47. A devised lands to B. his heir for life; and if B. should die without issue living at his death, then the fee should remain to the right heirs of B.; it was resolved that B. took an estate for life, with remainder in fee in contingency; and it was said by Wyndham and Twisden, and agreed by the other judges, that the fee descended to B. as heir, till the contingency happened, though not so as to confound his estate for life, and was not in abeyance; that in relation to C., B. took only an estate for life; but in the mean time, by operation of law, he had the fee in such sort as that there should be a hiatus to let in the contingency when it happened. See *Archer's case*, 1 *Co. Rep.* 66.

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* From this decision it would seem that if the actual marriage is valid, (or where the woman after the abduction consents to the marriage voluntarily, and not induced by any precedent violence or menace,) her evidence ought not to be allowed. (1 Hale, P. C. 302; 4 *Bl. Com.* 209, *contra*.) Upon this subject, however, there are conflicting authorities; and the better opinion appears to be, that the offender should not be allowed to take advantage of his own wrong; and that the act of marriage, which is a principal ingredient of his crime, should not (by a forced construction of law) be suffered to disqualify the witnesses on whose testimony he might otherwise be convicted. 4 *Bl. Com.* 209; 1 Hale, 301; 1 East, P. C. 454.

When there is a demise for life, with remainder in contingency, the fee descends to the heir till the contingency happens, and is not in abeyance.

† A freehold is said to be in abeyance when there is no person *in esse* in whom it is vested. But it was a maxim of the feudal law that the freehold should never be in abeyance if it could be avoided. This rule was established for two reasons. 1st. That the superior lord might always know on whom he was to call for military services that were due for the feud; for otherwise the defence of the realm would be considerably weakened. 2d. That every stranger who claimed a right to any particular lands might know against whom he ought to bring his principle, or real action, for the recovery of them; as no real action could be brought against any person but the freeholder. In consequence of this principle, a freehold estate cannot be created to commence *in futuro*, because in that case, the freehold would be an abeyance from the execution of the conveyance, until the moment when the estate so created was to commence. The law also does not favor the abeyance of the fee-simple, for in that case many operations of law are suspended. The particular tenant is rendered dispensable for waste, as a writ of waste can only be brought by the person entitled to the fee-simple. The title, if attacked, could not be completely defended, for there was no one in being whom the tenant of the freehold could pray in aid to support

So where there is a devise in remainder in fee in contingency ey;

2. *PUREFOY v. ROGERS*, 1570, K. B. 2 Saund. 380; S. C. 1 Lev. 39; 3 Keb. 11.

S. devised lands to his wife for life; and should it please God to bless her with a son, and she should call that son by the testator's christian and surname, he gave the inheritance of the lands to him after his mother's life; and if he died before he came to twenty-one, then the testator gave the inheritance of his lands to his, the testator's, heirs forever. Before any son was born, the heir of the testator conveyed the estate to the wife and her second husband by fine. It was urged that the contingent remainder to the son was not destroyed; for that at the time of the fine, the heir of the testator had no reversion or estate in him, for that an estate for life was devised to the wife, and the remainder in fee was devised to her son upon a contingency; so that till it could be known whether such contingency would happen or not, the reversion must be in abeyance and not in the heir, and then his conveyance gave no estate to the husband and wife, but they were only tenants for life of the wife as before. But Hale, Chief Justice, interrupted the counsel and said, it was clear that the reversion was in the heir of the testator by descent, and not abeyance, and accordingly it was adjudged that the contingent remainder was destroyed.* See *Fortescue v. Abbott*, Pollex, 479; S. C. T. Jones, 79; *Wood v. Ingersole*, Cro. Jac. 260; *Kent v. Harpool*, 1 Vent. 306; Ca. Temp. Hard, 16.

Or where there is an executory devise;

3. *CLARKE v. SMITH*, T. T. 1697, C. P. 1 Lutw, 793.

Per Cur. In all cases of executory devises the estate descends till the contingency happens. See *Pay's case*, Cro. Eliz. 878, *Gore v. Gore*, 2 P. Wms. 28; *Hayward v. Stillingfleet*, 1 Atk. 422; *Fearn*, Cont. Rem. 495, 7th ed.

his right; nor could the mere right itself, if subsisting in a stranger, be recovered in this interval, for in a writ of right, patent tenant for life cannot join in the mere right. (Hargr. Law Tra. 507.) And in modern times, the Courts discontinue as much as possible the abeyance of the fee-simple, because it would be a restraint on alienation. 1 Com. Dig. 20. The property in goods and chattels cannot be in abeyance. (Plowden, 565.) For where the owner dies, it must be in the executor, administrator, or residuary legatee. (*Hallam v. Ley*, Brownl. 132.) As to the freehold of the church being in abeyance during the vacancy of an incumbent, see Co. Lit. 647; 1 Burn. Ecc. Law, 1; 2 Bl. Com. 107; 1 Prest. Conv. 107; 1 Vin. Ab. Abeyance, 106.

* This opinion of Lord Hale is agreeable to what had been before determined in a case where the testator devised land "to his eldest son, Thomas, for life; and if he died without issue living at the time of his death, to Leonard, another son, and his heirs; but if Thomas had issue living at his death, then the fee should remain to the right heirs of Thomas for ever; it was adjudged that Thomas took only an estate for life, with a contingent remainder to Leonard in fee; and it was said by Wyndham and Twyden, Justices, and agreed to by the other judges, that the fee descended to Thomas, as heir, until the contingency happened, and was not in abeyance; that in relation to Leonard, Thomas took only an estate for life; but in the mean time, by operation of law, he had the fee in such sort that it should not merge the estate for life, but there should be an *hiatus* to let in the contingency when it happened; and it was compared to *Archer's case*, 1 Rep. 66. h; where, though Robert took an estate only for life by the will, yet, by operation of law, he had the fee also. Sir T. Raym. 28; *Plunkett v. Holmes*, 1 Lev. 11; 1 Sid. 47. S. C. Lord Hale's opinion has been also recognised in a subsequent case, where Sir M. A. devised to E. for life, and in case E. should have issue male, then to such male and his heirs for ever, and after the death of the said E. in case he should leave no issue male, then to T. S. in fee. After the testator's death, E. before he had any issue male, suffered a common recovery of the lands to himself in fee, it was held that the remainder to T. S. was contingent, and destroyed by the recovery; and then the question was, whether the remainder in fee to T. S. was in abeyance, or did descend to the testator's heir at law.

Sir Joseph Jekyll, then Master of the Rolls, held that the fee was in abeyance; but on appeal to Lord Chancellor Parker, he was of opinion that it was not abeyance, but descended to the testator's heir at law, for wherever a remainder is devised in contingency, the reversion in fee descends to the heir at law in the mean time and whatever estate is not disposed of by the testator descends to the heir, and cited the above case of *Purefoy v. Rogers*, and the before-mentioned case of *Plunkett v. Holmes*, as in point; and therefore he held that the heir of the testator, having the reversion in fee descended on him, had a right of entry commencing upon the forfeiture which the tenant for life had incurred by suffering the recovery. See 1 P. Wms. 505. *Carter v. Carnardiston*; *Lodding v. Kime*, 1 Salk. 224; S. C. 1 Ld. Raym. 203; 3 Lev. 431; 2 Bro. Ca. Parl. 15; *Hopkins v. Hopkins*, 1 Atk. 590; *Chapman v. Blisset*, Ca. Temp. Talb. 151; *Watkins*, Depc. 202; *Fearn*, Con. Rem. 355. 7th ed. In the case, however, of *Vich v. Edwards*, 3 P. Wms. 372. which was a devise to A. and B. and the survivors of them, and

4. *DAVIS v. SPEED*, H. T. 1691, Carth 262; S. C. 4 Mod. 153; 5 id. 145; 2 Salk. 675, Show. Par. Ca. 104.

Per Holt, C. J. Where a feoffment is made to the use of A. in tail, remainder to the use of the right heirs of T. S. who is then living, the fee simple is not in abeyance, nor in the feoffees, but results to the feoffor, and remains in him till the contingency, viz. the death of T. S. happens. See Fearn, Cont. Rem. 353; Prest. Ent. 103. [90]

(C) OF A TITLE OF DIGNITY.

SIR RICHARD VERNEY'S CASE, E. T. 1693, Skin. 432; S. C. Coll. 322.

Sir Richard Verney, Knight, claimed the barony of Broke, as lineal heir to Sir Robert Willoughby who was summoned to parliament 7 Hen. 7. the writ being directed to Robert Willoughby de Broke, Chevalier, to whom succeeded Sir Robert Willoughby, who was summoned to parliament by the same title, and sat accordingly in the reign of Hen. 8; from him the barony descended to Lady Elizabeth Greville; (she, having survived her two sisters, who ever there died without issue; from whom it descended to her grandchild and heir, Sir Foulk Greville, Knight; (who was created Lord Broke, to him and his heirs male;) but who dying without issue, the barony descended to Margaret, Lady Verney, the petitioner's grandmother. The attorney-general argued against this claim, 1st. That a summons by writ did not create an estate in fee; for the death of all that anciently several had been so summoned, and yet their sons had never been summoned after them; nay, sometimes the very person first summoned had afterwards been omitted to be summoned. But he did not design to urge that any further; but chiefly insisted, that even in the time of King Henry 7. when Sir Robert Willoughby was first summoned, it was not considered as an estate in fee; urging Latimer's case; and of later times, Abergavenny's case, and Paget's. 3d. That if it did descend, it was extinguished in the co-heirs of Lady Margaret Greville, urging the Earl of Oxford's case. The counsel for the petitioner replied that, 1st. As to the baronies of Latimer and Abergavenny, those honours followed the entail of the lands, as baronies by tenure. As to the resolutions in the Earl of Oxford's case, touching the baronies of Bulbeck, Sandford and Badlesmere, that they were in his Majesty's disposition; they allowed that the king might dispose of them to which of the heirs of such survivor, in trust to sell Lord C. J. Talbot held, that the fee was in abeyance, it being uncertain which would be the survivor: that the trustees joining in a fine, might make a good title to a purchaser by way of estoppel, and that the heirs joining would have no other effect than that of supplying the want of proving the will. Vich v. Edwards, 3 P. Wms. 372; see observations upon this case in Fearn's Cont. Rem. 356; 2 Cruise, Dig. 448.

* It may perhaps be now safely stated, as a general proposition, that the fee simple during the suspense of a contingent remainder, remains in the grantor, and is not in abeyance, as well in common law conveyances, as in conveyances by way of use and dispositions by will. Fearn; 362. in support of this position cites the following case:—A. makes a lease for life, on condition that if the lessee has issues in his life the lands shall remain to W. in fee. A. recovers against the lessee in a writ of waste and has execution. Lessee has issue and dies. No action of formedon accrues to W. because the fee remained in A. until the lessee had issue, and then the recovery in waste defeated the first limitation. Brook, Read. on Stat. Lim. 84. And the same rule obtains with regard to powers of appointment; (*Cave v. Holford*, 3 Ves. 657; *Cox v. Chamberlain*, 4 Ves. 631; *Maundrell v. Maundrell* 10 Ves. 246;) for if a person limits to such uses as he shall appoint, and in the mean time, and until he makes an appointment to the use of himself and his heirs, or in case he limits it to the use of himself for life, and after his decease to such use as he shall appoint, for want of appointment to the use of his right heirs, in both these cases the fee simple remains in him, subject to be diverted by the exercise of his power of appointment.

† It is, however, in the power of the crown, during the continuance of the co-heirship, to terminate the abeyance or suspension of the dignity, by nominating any one of the co-heirs to it. Such nomination operates, not as a new creation, but as a revival of the ancient dignity, for the nominee becomes entitled to precedence according to the date of the dignity. 3 Cruise, Dig. 249. The abeyance terminates as a matter of course whenever there remains, by the death of some of the co-heirs, but one heir; but the attainder of one of two co heirs does not determine the abeyance. Dignities are not within the statute of limitations, and may consequently be claimed at any distance of time; and there are instances of claims being recognised after the dignities had been dormant for some centuries. 3 Cruise, Dig. 254. 261. 1172.

co-heirs he pleaded during the co-parcenership, but not to a stranger, nor to the heir male collateral, who had no right thereto, so long as there were heirs general. The House of Lords resolved, that the petitioner had no right to a summons to parliament. See 3 Cruise, Dig. 254, 255; Collins, 322, 412; 2 Dugd. Bar. 357; Lord's Journ. 15 vol. 634, 643; 21 vol. 266, 339; and on the subject of titles of honor being in abeyance generally, see 2 Cruise, Dig. 245 to 274; Co. Lit. 165, a. and note; 3 Thomas's Co. Lit. 115, n; 3 Com. Dig. 468; Chit. Junr. on the Prerogatives of the Crown.

Abiding by Plea.

Before joinder in demurrer the defendant may strike out his special plea and plead the general issue, unless he be railed to a bid by the former;

(A) IN THE KING'S BENCH, p. 91.

(B) IN THE COMMON PLEAS, p. 93.

(A) IN THE KING'S BENCH.

1. ANON. M. T. 1695, K. B. 2 Salk. 515.

Before joinder in demurrer the defendant may waive his special plea, and plead the general issue; but if he be ruled to abide by his plea, and then pleads specially, as he may, and the plaintiff demurs, the defendant cannot waive his special plea and plead the general issue. See R. T. 5 and 6 Geo. 2. b; 1 Wils. 29; 1 Sellow. 311; Imp. K. B. 340; 1 Tidd, 701, 7th ed.; 1 Andr. K. B. 124.

2. FOSTER v. SNOW, E. T. 1758, K. B. 2 Burr. 781.

Or ordered by a judge in vacation to plead such a plea as he will elect to abide by.

This was an action on a policy of insurance; the declaration was delivered in Hilary Term, on the 8th of February. The venue was laid in the county palatine of Lancaster. The defendant's attorney applied to Lord Mansfield, and obtained an order from his Lordship "for ten days time to plead, the defendant pleading an issuable plea, and consenting to take short notice of trial, if necessary for the next assizes." The defendant had filed a bill in Chancery, to which no answer had been put in, and being desirous to ascertain what answer would be made to his application to the Court of Equity before he pleaded, endeavouring to put off the common law trial till after the then approaching assizes, in order to accomplish this he pleaded a sham plea of a judgment recovered in another court." On his pleading this sham plea, the plaintiff's attorney immediately applied (it then being vacation time) to Mr. Justice Denison, who made an order, "That the defendant should plead such plea as he would stand by." It was objected, "that such an order ought not to have been made by a judge at his chambers."

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If the defendant after being ruled to a bid by his plea, elect to do so, the plaintiff cannot sign judgment as for want of a plea, but must proceed to make up the issue.

The plaintiff's attorney put in a replication of nul tiel record, and made up and delivered the paper book with the common rule endorsed thereon "to return it within four days, otherwise a writ to issue." The defendant's attorney returned the paper book within four days, but at the same time gave notice that he would move the Court "that the judge's order might be discharged, and that the defendant might be at liberty to waive his plea." And he afterwards made an affidavit of all the above circumstances, and also "that he verily believed, from what evidence he was already possessed of, together with such further evidence as he expected to arise from the plaintiff's answer to the bill in Chancery, that the defendant would be able to make a good defence at the trial of the common law cause;" and offered to bring all the money demanded into court. The Court all agreed in considering the order made by Mr. Justice Denison, not only as being correctly granted under the circumstances, but as being such a one as might be properly made by a judge at his chambers.

3. WEBB v. HOLT, T. T. 1743, K. B. 2 Stra. 1234.

The defendant having pleaded a sham plea, the plaintiff obtained the common rule, that the defendant should plead peremptorily on the morrow, and that such plea should not be waved; and serving it on the defendant's attorney, who, taking no notice of it, the plaintiff, after the expiration of the time limited, signed judgment, which the Court, on the master's report, held to be irregular, the first plea being valid until the defendant chose to avail himself of the opportunity given him of substituting another.

* In term time this is a motion of course, requiring only counsel's signature.

4. *DRAYCOTT v. PIDDINGTON*, M. T. 1816, K. B. 1 Chit. Rep. 565, n. S. P.
DUBERLY v. PHILLIPS, M. T. 1816, K. B. 1 Chit. 565, n.

This was an action of debt on bond, to which the defendant pleaded a set-off of money due on bond, and recognizance and simple contract. The plaintiff, after ruling him to abide by his plea, treated the plea as a nullity, and signed judgment. It was contended in support of the judgment that the rule made no difference, and that the pleas being fictitious defences, he was entitled to sign judgment. On the other hand it was submitted, that the plaintiff, by obtaining a rule that the defendant should abide by his plea, admitted that there was a plea on the record, and that it, could not, after such a recognition, be treated as totally inoperative, and that the plaintiff had acted irregularly in signing judgment without applying to the Court. *Per Cur.* The Court entertains no doubt but that this is a sham plea; and if it had not been for the rule on the defendant to abide by his plea, we should have deemed it a nullity; but against the party who has treated the plea as a valid one, we are precluded by the terms of the rule from saying that it is no plea. See 1 B. & C. 286; S. C. 2 D. & R. 661.

5. *THOMAS v. VANDERMOOLEN*, M. T. 1818, 2 R. & A. 197.

The defendant had pleaded judgment recovered and payment to an action of assumpsit. The plaintiff ruled him to abide by his plea; and afterwards, without applying to the Court, the plaintiff signed judgment. On a motion to set it aside, on the same grounds as stated in the preceding case, the Court said, the rule calling on the defendant to abide by his plea, makes no difference; it in fact puts him on his guard; it gives him the option to abide by it or not, as he may think proper; and if he elect to abide by it, he must do so subject to all its consequences. See tit. "Sham Pleas."

6. *LAW v. LAW*, H. T. 1733, K. B. 2 Stra. 960; *S. P. WELD v. WELD*, M. T. 1743, K. B. 1 Wils. 29, note in margin. *HARE v. LLOYD*, E. T. 1737, 1 T. R. 693. *PROUT v. DEWAR*, Id. n. a. *CLEWLY v. RAMSBOTTOM*, E. T. 1806, 3 Smith, 179.

Debt upon bond condition for payment of money on a future day. The defendant pleaded payment at the day; and before the plaintiff had replied, moved to withdraw the plea and plead the statute of 5 E. 6, c. 16, against the sale of offices. *Sed Per Cur.* This is never done but in order to plead the general issues; not to substitute one special plea in the room of another.

See *Mead v. Phillips*, 2 Stra. 906; 2 Barnard, K. B. 390; 2 Keb. 181, pl. 148; 1 Wils. 223.

7. *COCKRAN v. ROBERTSON*, M. T. 1729, K. B. 1 T. R. 693. *S. P. BLACKBOURN v. MATHIAS*, E. T. 1746, K. B. 2 Stra. 1267.

The defendant having pleaded a judgment recovered in a former action, the plaintiff obtained a rule for the defendant to abide by his plea. The defendant then pleaded a set-off, which it was contended was irregular, as he was only entitled under such circumstances to plead the general issue. The Court conceded to this proposition, but observed that the defendant might have pleaded the general issue and given a notice of set-off.

8. *WHITE v. GIVENS*, T. T. 1816, cited 1 Tidd, 701, n. 1. 7th ed.

Per Cur. Where the defendant is under terms of pleading issuably, he is bound to abide by his plea, and cannot afterwards strike out a special plea or demurrer when the paper book is made up, and return it with the general issue. See 3 T. R. 305; Barnes, 314; 1 East, 411.

(B) IN THE COMMON PLEAS.

1. *COOPER v. MANSFIELD*, T. T. 1790, C. P. cit. Imp. Prac. C. P. 306, 5th ed.

A motion was made for the defendant to abide by his plea. The Court rejected the motion, saying it was unnecessary, inasmuch as by the practice of this court (the Common Pleas) a defendant must abide by his plea.

Common Pleas after replication, must abide by his plea, although a rule for that purpose has not been obtained.

In the same term but before the delivery or filing of the replication he may waive his special plea and plead the general issue, with out paying costs.

2. *HORSEFALL v. GREENWOOD*, H. T. 1778, Ca. Prac. C. P. 155; S. C. Barnes, 127. *S. P. ROBINSON v. SIMMONS*, M. T. 1731; Prac. Reg. C. P. 302.

The defendants in Hilary vacation pleaded several pleas, but in the same vacation, and before a replication was filed, withdrew his special pleas, and pleaded the general issue. *Per Cur.* After a special plea pleaded, though the plaintiff may have prepared his replication, yet the defendant may the same term, before the delivery or filing of the replication, wave his special plea, and plead the general issue, without paying costs.

3. *ELLIS, qui tam, &c. v. ———*, H. T. 1768, C. P. 2 Wils. 369.

The defendant had pleaded in a preceding term a judgment recovered in the King's Bench for the same offence, and now moved for permission to withdraw that plea, to plead the general issue, and take short notice of trial.

Per Cur. The defendant has delayed the plaintiff by this sham plea; he has produced no affidavits that he has any merits, and deserves to pay the penalty for pleading a sham plea; the rule to withdraw the plea must be discharged.

4. *REEVES v. PROBART*, H. T. 1733, C. P. Barnes, 330.

A motion was made that the defendant might have leave to withdraw his plea of tender, and plead the general issue, upon payment of costs. The Court denied the application, because this alteration of the plea would put plaintiff to an inconvenience, the money pleaded to have been tendered having been brought into court.

5. *FREEMAN v. JONES*, H. T. 1769, 2 Wils. 391. *S. P. BROWN v. JAMB*, T. T. 1751, C. P. Barnes, 362.

In assumpsit for goods sold and delivered to the defendant and one N. his late partner, deceased, the declaration was entitled of Easter Term. In Trinity Term the defendant pleaded a bond given by him and N. in satisfaction. In Michaelmas Term the plaintiff replied, concluding to the country. In the beginning of the following Hilary Term a motion was made that the defendant, upon payment of costs, might have leave to withdraw his special plea and plead the general issue. An affidavit was produced, in which it was stated that the special plea had been pleaded by the defendant's attorney in mistake, and that the defendant had a good defence upon the general issue.

Per Cur. Such a motion has been sometimes granted; but here the plea goes to the merits of the action, and was filed so long ago as last Trinity Term. The defendant has laid by the whole of Michaelmas Term; we can see no reason for allowing the defendant to withdraw his special plea, and after the delay obtain the indulgence prayed. Rule discharged.

6. *WILKES v. WOOD*, M. T. 1763, C. P. 2 Wils. 204.

In trespass, assault, and imprisonment, the defendant pleaded the general issue, upon which issue was joined, and notice of trial given for the 11th of November. On Monday, the 7th of November, the defendant moved for leave to withdraw his plea of the general issue, and to plead again the general issue, with a special justification under a warrant of Lord Hallifax, secretary of state, and he relied upon the case of *Taylor v. Jodd*, B. R. Mich. 23 Geo. 2, where in an action for false imprisonment the defendant had pleaded the general issue; and the Court gave him leave to withdraw that plea, and plead a justification, that he was master of a ship, that plaintiff was making a mutiny therein, and so he imprisoned him; upon terms of taking short notice of trial, and giving plaintiff judgment of the same term. *Per Cur.* Let the rule be made absolute upon the defendant's taking short notice of trial, and consenting that if the plaintiff has a verdict he shall have judgment as of this term.

7. *FREE v. HAWKINS*, H. T. 1817, C. P. 1 B. Moore, 28; S. C. 7 Taunt. 278.

A rule was obtained for leave to withdraw a sham plea pleaded by the defendant's attorney, in order to gain time to enable him to receive instructions from his client, who resided at a considerable distance from the metropolis, which was afterwards made absolute on the production of an affidavit of merits,

the defendant consenting to plead the general issue, trying after term, with judgment of the term, and paying the costs of the application.

Ability. See tits. Action, Alien, Baron and Feme, Capacity, Corruption of Blood, Devise, Grant, Idiot, Infant, Limitations, Statute of, Lunatic, Parties to Actions.

Ab initio. See 5 E. 4, 6; 8 E. 4, 17; 13 E. 4, 9; 32 E. 4, 47; 5 H. 7, 11; 10 H. 7, 18, line 5; 27 H. 8, 24, and post tits. Distress, Trespass.

Abjuration. See tit. Sanctuary; and on this subject in general see 26 Li. Ass. p. 19; 29 id. p. 11; 9 E. 4, 28; 7 H. 7, 7; 11 H. 7, 4; 5 Co. 12; Kelynge, 36; H. P. C. 172; Staundf. P. C. 1166; 2 Hawk, P. C. 84, 6th ed; id. 474; 1 Leach, 398; Precedent that plaintiff has abjured, Clift. 5.

Abode, place of. See tits. Addition, Affidavit, Bail, Practice.

Abortion.

GOLDSMITH'S CASE, 1811, 3 Camp. 72, coram Lawrence, J.

This was an indictment on the first section 43 Geo. 3, c. 58, for administering *savin* to Miss G. being at the time quick with child, to procure an abortion. It appeared by the evidence that at the time it was given to her by prisoner she was in the fourth month of her pregnancy; but she swore that she was not then quick with child; and the medical men who were examined gave conflicting evidence as to the exact period of gestation, when it may be said that the fetus has a distinct existence; they, however, agreed that it usually takes place about the fifteenth or sixteenth week after conception.† The judge ruled that the evidence of Miss G. that she had not felt the child alive within her, was sufficient to take the case out of the statute, and that the words "quick with child" must be understood in their popular sense, and directed the jury to acquit the prisoner. See *Precedents, Petersdorff's Index, Crim. Div. p. 1; and Arch. Crim. Pl. 237.*

The prisoner was afterwards indicted on the second section of the same act, in which he was charged with having administered to Miss G. a decoction of a certain shrub called *savin*. It appeared from the testimony of medical men, who were examined, that as the liquid was prepared by pouring boiling water on the leaves of the shrub, it was not properly a decoction (which is made by

* The act after reciting that certain heinous offences, with intent to procure the miscarriage of women, had been of late frequently committed, and that no adequate means had been provided for their prevention and punishment, enacts, that if any person or persons shall, either in England or Ireland, wilfully, maliciously, and unlawfully, administer to, or cause to be administered to, or taken by any of his majesty's subjects any deadly poison, or other noxious or destructive substance or thing, with intent such his majesty's subject or subjects thereby to murder, or thereby to cause and procure the miscarriage of any woman then being quick with child, the person or persons so offending, their counsellors, aiders, and abettors, knowing of and privy to such offence, shall be felons and shall suffer death, as in cases of felony, without benefit of clergy. At common law an infant in its mother's womb, not being in *rerum natura*, was not considered as a person who could be killed within the description of murder; and therefore prior to the above enactment, a party administering medicine to produce an abortion, whereby an unborn child might have been killed, was not punishable as murder or manslaughter. See *Bract. 121; 1 Hale, 143; 1 Hawk. P. C. c. 131. 116; 4 Bl. Com. 195; See precedent at common law for a misdemeanor, 3 Chit. Crown Law, 788.*

† See Mr. Hargrave's note, 1 Thomas, Co. L.J. 142. in which it is stated that the eminent anatomist, Dr. Hunter, was of opinion that a child may be born alive at any time from three months, but that none have been born with powers of coming to manhood, or of being reared, before seven calendar months or near that time; at six months it is impossible.

‡ This section enacts that if any person or persons shall wilfully and maliciously administer to, or cause to be administered to, or taken by any woman, any medicine, drug, or other substance or thing whatsoever, or shall use or employ, or cause or procure to be used or employed, any instrument or means whatsoever, with intent thereby to cause or procure the miscarriage of any woman not being, or not being proved to be, quick with child at the time of administering such things, or using such means, that then, and in every such case, the person or persons so offending, their counsellors, aiders, and abettors, knowing of and privy to such offence, shall be, and are hereby declared to be, guilty of felony, and shall be liable to be fined, imprisoned, set in and upon the pillory, publicly or privately whipped,

having received instructions to that effect from his client, on the production of an affidavit of merits, the Court permitted it to be with drawn on terms.

The inter-pretation to be put upon the expression "quick with child," in the 1st sect. of the stat. 43 G. 3, c. 58,* is that the fetus has been felt by the woman to be alive within her. [96] When the indictment on the second sec-

this act charged the defendant with having administered a decoction of savin, proof that he administered an infusion of savin in was held en to maintain the indictment. It need not be averred in the indictment that the substance was in fact noxious, or that the woman was actually with child. And if averred these facts need not be proved.

[97] A demand cannot be abridged in formedon or other writ where the parcels are particularly demanded in the writ, *aliter* in an assize de libero tenemento, or as dower when the writ is general, boiling the substance) but an infusion; and on the ground of this variance it was contended that the defendant was entitled to an acquittal; but the judge refused to allow the objection, considering the misdescription immaterial, the expression being *quodum generis*. See S. P. 2 Hale, P. C. 291; Overbury's case, Harg. St. Tr. 113; Jackson's case, 9 id. 715; Mackally's case, 9 Co. Rep. 61, 67; 1 East, P. C. c. 5, s. 107, p. 341; 2 Hawk, P. C. c. 23, 84; Fost. 104; Gilb. Ev. 231; 1 Phil. Ev. 164-5, 3d ed; 1 Russ, 617; Arch. Crim Pl. 237.

In the same case, on its being objected that the shrub from which the infusion had been made was not savin, the counsel for the prosecution contended that the defendant might nevertheless be convicted upon the last count, which charged him with having administered a certain mixture to the jurors unknown, "then and there being a noxious thing;" it was urged on behalf of the prisoner that if the substance administered was not savin, there was no evidence of its deleterious properties; but the judge overruled the objection, considering it to be immaterial whether in fact the drug or other thing administered were likely or calculated to cause abortion, or whether the female were with child at the time or not; and that it was sufficient to prove that the defendant imagined her to be pregnant, and that he had administered the drug with an intent to procure the miscarriage.

Abridgment. See tit. Copyright.

CHETHAM V. SLEIGH, T. T. 1681-2, C. P. 3 Lev. 68.

Per Cur. The demandant cannot abridge his demand in a formedon, or any other writ wherein the thing demanded is particularly mentioned in the writ, for that would be to falsify his own writ, and therefore in such case the writ shall abate for all; but otherwise where the writ is general, and comprehends no certainty; as in an assize, which is generally *de libero tenemento* in D. and in dower *unde nihil habet*, &c. for there the writ being general *de libero tenemento*, notwithstanding an abridgment, the writ remains true as to the residue, for it is *liberum tenementum* still; but in assize, dower, &c. if the demand *de libero tenemento* in D. and S. there can be no abridgment as to all the lands. See 19 Hen. 6; 14 Hen. 6, 3, 4; 9 Hen. 6, 43, a; 8 Hen. 6, 13, a; Latch, 175; Poph. 209; 1 Lev. 58; 2 Cro. Car. 128; 3 T. R. 13; 5 T. R. 402; 4 M. & S. 94; 1 Com. Dig. Abridgment; 1 Vin. Ab. 3.

Abstronding. See tit. Poor, Settlement of.

Absence. See tits. Conviction, Execution, Judgment, Master and Servant, Poor, Settlement of.

Absenting himself. See tit. Bankrupt.

Absolution. See tit. Excommunication.

Absque hoc. See tits. Pleading, Traverse.

Absque impetione vasti. See tit. Waste, and 10 H. 7, 3; 21 H. 7, 30.

Abstract. (A) REQUISITES OF, p. 97.

(B) PROPERTY IN, WHOM VESTED, p. 98.

(A) REQUISITES OF.

RICHARDS V. BARTON, H. T. 1795, 1 Esp. N. P. C. 268.

An ab

The plaintiff declared in an action of assumpsit, stating that the defendant

or to suffer one or more of the said punishments, or to be transported beyond the seas for any term not exceeding fourteen years, at the discretion of the Court before which such offender shall be tried and convicted. As the language of this section of the statute is, "not being, or not being proved to be, quick with child," an indictment, it would appear, cannot be supported upon it, if it be established in evidence that the woman was actually quickened with child at the time the medicine was administered.

had undertaken to grant him an annuity, charged upon certain premises, and [98] that he had represented to the plaintiff that there was only one outstanding abstract ought to mention judgment; but it appeared, that prior to the execution of the deeds, it was as- every in- certain that the estate was charged with another incumbrance. The plain- cumbrance-iff consequently refused to complete his contract, and brought the present ac- affecting- tion to recover the expenses for preparing the deeds, and the interest of the the estate, money from the time of making the first contract to the final abandonment and should of the business. Per Lord Kenyon. The grantor in this abstract of title, therefore ought to have recited every incumbrance charged upon the premises; the ab- contain an-stract is therefore imperfect; and as the defendant has misrepresented the na- account of- ture of the proposed security, and not disclosed those defects with which he every judg- was acquainted, I am of opinion that the plaintiff is entitled to recover. Ver- ment by-dict for plaintiff. See precedents of declaration for not delivering an Abstract, which the est- Pl. Ass. 62; 2 Chit. Pl. 159; 4 Taunt. 334; and Preston on Abstracts, 41. estate is af- fected.*

(B) PROPERTY IN, IN WHOM VESTED.

ROBERTS V. WYATT, H. T. 1810, C. P. 2 Taunt. 268.

The defendant had agreed to sell the plaintiff an estate under the usual When un- conditions, that in case the vendor could not make out a title the contract der a sale should be void. It was stipulated in the contract of sale that the vendor conditioned- should, within two months from the date thereof, make out and deliver an ab- to be void-stract of the title. The plaintiff laid the abstract before counsel; and hav- if the ven- ing received it back with an opinion written at the foot, and several queries make a- in the margin, left it with the defendant, requesting him to copy the opinion good title, and marginal observations, and return the abstract as soon as he had copied an abstract- them. After the plaintiff had several times in vain applied to have the ab- of it is de-stract returned, he at length made a formal demand of it, when the. delivered to- defendant refused to re-deliver it, observing, that as he had been unable to clear up the the vendee objection of the plaintiff's counsel, the abstract would be useless to the plain- may main- tiff. The plaintiff offered to take the estate with such a title as defendant tain trover could make, but the latter refused to assent to the proposal. An action of for it a- trover having been brought for the abstract, a verdict was found for the plain- gainst the- tiff, as it was considered, by means of the notes and remarks made by the vendor. When the counsel on the abstract, he had such a species of property as would enable contract is- him to recover, subject to the opinion of the Court as to the general right of deter- the abstract- property. A rule nisi was now obtained to set aside the verdict, and enter a- becomes- nonsuit. Per Cur. As to the general property in the abstract, while the the prop- contract is open, it is neither in the vendor nor in the vendee absolutely; but- erty of the- if the sale is perfected, it is the property of the vendee; if the sale is broken vendor, but- off, it is the property of the vendor. For although a proviso (that in case an opinion- the vendor of an estate cannot deduce a good title, or the purchaser shall not written- pay the money on the appointed day, the agreement shall be utterly void) thereon, by- gives an option to the vendor to rescind the sale in case the vendee does not the seller's- pay the money, and to the purchaser to rescind in case the owner does not consent con- tinue the- make a title, the plaintiff cannot say, "I am not ready with my money, and property of- therefore I will avoid the contract." Nor can the seller say, "My title is the pur- not good, and therefore I shall be off." If the present plaintiff had said, chaser, [99] "The sale is abandoned by me, as the defendant cannot make a title," the matter might be at an end. But on the contrary, the plaintiff says that he will take the estate with the title such as it is. He has therefore a temporary property, which continues until all the purposes are answered for which the abstract was delivered, on which he may recover not only against a stranger, but against the proprietor of the estate, and may keep it even if the title be rejected, until the dispute be finally settled for his own satisfaction, in order to show on what ground he did reject the title. Besides, the abstract is in this case returned for a particular purpose. The plaintiff's attorney told the defendant that it was delivered to him for the express purpose of enabling him

* In equity the abstract is considered as complete whenever it appears that upon the fulfilment of certain acts the legal and equitable estate will be in the purchasers, although that may be long before the title can be completed.

to examine and answer the objections, and that it must be again restored to the purchaser, and the defendant accepted it on these conditions. The opinion written on the abstract was necessarily written on the vendor's paper; and by his consent, and continues the property of the vendee. The rule for a nonsuit must be therefore discharged. Rule discharged. See *Parker v. Patrick*, 5 T. R. 175; *Roe dem. Hall v. Wegg*, 6 T. R. 709.

Abuse of Process. See tit. *Attachment; Process.*
Abutments.

When the abutments by admeasurement are at variance with the number of feet specified in a lease, the latter it seems shall prevail.

1. *NEALE DEM LEROUX V. PARKIN*. M. T. 1794. K. B. 1 Esp. N. C. P. 229. In an action of ejectment, founded upon a building lease granted to the lessor of the plaintiff of fifty-nine feet, more or less, the lessee it appeared, had taken possession of, and covered with buildings, sixty-two feet. The space thus occupied corresponded exactly with the abutments in the lease, but not with a strict admeasurement. On the part of the defendant it was proved that the lessor of the plaintiff had been constantly in the habit of seeing the building and consequent encroachment during its progress, without offering any objection to it. Per Lord Kenyon, C. J. From the indefinite nature of the expression "more or less," the tenant has a right to contend that the quantity of land intended to pass ought rather to be regulated by the abutments than by the admeasurement. It will, however, in this case, be for the jury to determine whether the acquiescence of the lessor of the plaintiff in these encroachments may not be inferred from his non-interference. Verdict for defendant. As to such implied acquiescences in general, see *Attorney-General v. Baliol College, Oxford*, 9 Mod. 411; *East India Company v. Vincent*, 2 Atk. 83; *Jarrett v. Leonard*, 2 M. & S. 265; *Doe v. Sheppard*, 3 Taunt. 78; *Maltby v. Christie*, 1 Esp. 341.

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Abutments are not in general to be construed strictly; but in their strict sense they include the idea of contiguity, though not necessarily, in question to the defendants dwelling house—and the fifth, stating a footway over the place in question. The cause was twice tried. At the first trial the issues upon both these pleas were found for the plaintiff, and all the other issues for the defendant. At the second trial the first of these issues was found for the plaintiff; but the second, and the issue on the last count, for the defendant. Contradictory evidence was adduced as to the fact of whether the strip of land was in fact a footway or not. Upon the second trial, Lord Ellenborough expressed himself thus.—Had the land been sold expressly for the purpose of building a house thereon; there would have been a way of necessity; but as it does not appear that such was the case, there could consequently be no such way. The only question then is, whether there was a public footway. The word abutting does indeed, in its strict sense, imply contiguity; but it is not necessary that the contiguity should continue along the whole length of the land granted. The mention in any deed of conveyance of whether the land be or be not dedicated to the public makes no difference as to the question whether it is a highway. A rule nisi was obtained for new trial on the different counts found for the respective parties.

2. *ROBERTS V. KARR*, H. T. 1809, C. P. 1 Taunt. 495. The plaintiff granted to the defendant a tract of land, which was described as abutting by a road on his own soil. It abutted in one part on the road, but in another part a narrow strip of the grantor's land intervened between the road and the premises granted. The present action was brought for breaking and entering upon that strip of land. There was also a count for an injury done to a wall of the plaintiff's in a different place, by inserting rafters into it, which was proved to be damaged to the amount of four or five pounds. There were several pleas; but the only two necessary to be mentioned were the fourth, stating a way of necessity from the road over the place in question to the defendants dwelling house—and the fifth, stating a footway over the place in question. The cause was twice tried. At the first trial the issues upon both these pleas were found for the plaintiff, and all the other issues for the defendant. At the second trial the first of these issues was found for the plaintiff; but the second, and the issue on the last count, for the defendant. Contradictory evidence was adduced as to the fact of whether the strip of land was in fact a footway or not. Upon the second trial, Lord Ellenborough expressed himself thus.—Had the land been sold expressly for the purpose of building a house thereon; there would have been a way of necessity; but as it does not appear that such was the case, there could consequently be no such way. The only question then is, whether there was a public footway. The word abutting does indeed, in its strict sense, imply contiguity; but it is not necessary that the contiguity should continue along the whole length of the land granted. The mention in any deed of conveyance of whether the land be or be not dedicated to the public makes no difference as to the question whether it is a highway. A rule nisi was obtained for new trial on the different counts found for the respective parties.

Per Cur. Abutments have never been construed very strictly. Thus if premises be described as abutting to the east, it may be the north-east or south-east. A person purchasing a piece of ground, described as abutting upon a road, contemplates the right of coming out into the road through any part of the premises. To judge by the deeds of conveyance executed between the

parties, there could be no doubt; and although parol evidence was introduced to show that the ground in question never was a high way, yet that evidence came from a party interested, and under such a bias as to render the evidence very doubtful of credit. When a grantor has a recourse to the particularity of describing land by feet and inches (as has been done in this case) is it not probable that he would describe it as abutting on this piece of ground if he had intended to reserve it. This is very dissimilar to the case put of a conveyance of a field, described to abut on the road, made by a man who was not owner of the soil between the field and the road, as the party was here. But, even although the grantor may have intended to reserve the land, he could not do so now in accordance with the terms of the deeds; as the lease, by describing the land "as abutting on the road," deprives the plaintiff of the power of saying that the land on which it abutted is not the road. As to the issue found for the plaintiff in respect of his wall having been damaged to the amount of five pounds, a new trial cannot be granted for so trifling a sum, and it is besides only a question of judgment. The rules in both cases must be therefore discharged. Rule discharged.

Accedas ad Curiam. See tit. *Recordari facias loquelam.*

Acceptance. See tit. *Accord and Satisfaction; Bills of Exchange; Condition; Dignity; Doner; Esloppal; Escheat; Executor and Administrator; Frauds, Statute of; Homage; Landlord and Tenant; Office; Rent; Surrender; Vendor and Purchaser; Waste.*

Access. See tit. *Baron and Feme; Bastard.*

Accessary.

- I. AT THE FACT, p. 101.
- II. BEFORE THE FACT, p. 102.
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- IV. PROCEEDINGS AGAINST.
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V. IN PARTICULAR OFFENCES—See tit. *Arson; Burglary; Forgery; Horse-stealing; House-breaking; Manslaughter; Mayhem; Murder; Petit Treason; Rape; Receiver of Stolen Goods; Robbery; Sacrilege.*

I. AT THE FACT.

REX v. GORDON AND ANOTHER, 1789, 1 Leach, C. L. 515; S. C. 1 East, P. C. 352.

This was an indictment for murder, charging Thomas Gordon as principal and Winifred Gordon as accessory before the fact. At the trial it appeared,

* Felons are either principals in the first degree; 2d. principals in the second degree; 3d. accessories before the fact; 4th. or accessories after the fact. 1 Russ. 29. Principals in the first degree are those who have actually and with their own hands committed the fact. Ibid. Principals in the second degree are those who were present aiding and abetting at the commission of the fact. Ibid. They are generally termed aiders and abettors, and sometimes accomplices. Ibid.

Mr. Justice Foster, 347. on this subject observes, that where two or more are to be brought to justice for one and the same felony, they are considered in the light either of principals in the first degree, as having actually and with their own hands committed the fact; or of principals in the second degree, as having been present, aiding and abetting at the commission of it; or of accessories before or after the fact. The distinction between principals in the first and second degree, or to speak more properly, the course and order of proceeding against offenders, founded on that distinction, seems to have been unknown to the most ancient writers on our law, who considered the persons present, aiding and abetting in no other light than as accessories at the fact, and consequently not liable to be brought to trial till the principal offenders should be convicted and outlawed. See 40 E. 3. 42. a; Lib. Ass. 2406; 25 Ed. 3. 446; 21 E. 4. 71. a; 4 H. 7. 18. a; 13 H. 7. 10. a; Plowd. 97; Comb. 17; But in Gordon's case, *vide supra*, it was the opinion of all the judges that the prisoner who was discharged upon this objection might be indicted again as a principal. So in 1 Hale. 625. it appears that if one person be indicted as principal, and another as ac-

A person present, aiding and abetting in the perpetration of a crime, can not be indicted as an accessory.*

from the evidence produced, that the latter, at the time of the murder was perpetrated, stood near the other prisoner, and said, "Fire, Tom, kill them;" upon this the gun which led to the catastrophe was discharged.

[102] It was contended that, from the nature of the evidence, Winifred Gordon was, if guilty at all, a principal offender; and that she could not be found guilty as an accessory before the fact, the evidence clearly showing that she ought to have been indicted as a principal.

The Court concurred in this opinion, and were clearly of opinion that she could not be convicted on the charge of being accessory, as the evidence adduced proved that she was aiding and abetting the principal culprit in the commission of the crime. See 3 P. Wms. 476; Haydon's case, 4 Co. 426; and Denton v. Chapple, Fost. 353; post. tit. Accomplice, Aiders, and Abettors.

II. BEFORE THE FACT.

1. *REX V. M'DANIEL AND OTHERS*, 1775, Old Bailey Sessions. Fost. 121; S. C. 10 St. Tr. 417, fol. edit.; 19 Howell, St. Tr. 746.

Whoever procures a felony to be committed though through the intervention of a third person, and without any communication with the principal is never theless an accessory before the fact.

M'Daniel, Berry, Eagen, and Salmon, were indicted as accessories before the fact in a robbery, upon the statutes 4 & 5 Ph. & M. c. 4. and 3 & 4 W. & M. c. 9; and upon the trial a special verdict was found, which stated that before the robbery, all the prisoners, and one Blee, in order to procure the rewards given by the acts of parliament for apprehending robbers on the highway, did meet and agree that Blee should procure two persons to commit a robbery on the highway at Deptford, upon the person of the prisoner Salmon, and for that purpose Blee should inform the persons so to be procured that he would assist them in a robbery of a different nature. In pursuance of this agreement, and with the privity of all the prisoners, Blee engaged E. and K. to go with him to Deptford, in order to steal linen, but did not at any time before the robbery inform E. and K., or either of them, of the intended robbery. That in consequence of this agreement, and with the privity of all the prisoners, Blee, E. and K. went to Deptford, and there meeting Salmon, who was waiting for them, they assaulted and robbed him. None of the prisoners had any conversation with E. and K. previous to the robbery, but M'Daniel, Eagen, and Berry, saw and approved of them as persons proper for the purpose of robbing Salmon. As to the prisoners M'Daniel, Berry, and Eagen, the judges were unanimously of opinion that, supposing a robbery had been committed on Salmon, the facts found by the special verdict were sufficient to charge them as accessories in the manner stated in the indictment; for the verdict found that every circumstance connected with the fact was settled and agreed on by the prisoners previous to the commission of the crime, and in consequence of that arrangement was committed. As to the circumstance that none of the prisoners had any conversation with E. and K. previous to the robbery, and that Blee's true design was not known by E. and K. it appears manifestly, by the facts found, that it was part of the original agreement that the true design should be concealed from them, and that they were to be drawn to the place of action under another pretence; this circumstance, therefore, being part of the original agreement, the prisoners could not avail themselves of it, if the agreement upon the whole, and what was done in consequence of it, be sufficient to make them accessories. The statute 4 & 5 Ph. & M. and 3 & 4 W. & M. were relied on by the counsel for the prisoners; the words of the former, which are descriptive of the offence, are, "if any person shall maliciously counsel, hire, command, or suborn," the latter in addition subjoining "shall comfort, aid, abet, or assist;" from which it was contended on their part, that without a personal immediate communication of counsels, intentions, and views, from the supposed accessories to the principals, there necessary, and both be acquitted, yet the person indicted as accessory may be indicted as principal, and the former acquittal as accessory is no bar. But it is said that if a person be indicted as a principal and acquitted, he shall not be indicted as accessory before. 1 Hale, 626; yet *qu.* and see Fost. 262. It seems to be admitted, that if a man be indicted as principal and acquitted, he may be indicted as accessory after; and so if he be indicted as accessory before and acquitted, he may be indicted as accessory after. 1 Hale, 626.

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could be no accessory before the fact. But the judges were of opinion, that whoever procures a felony to be committed, though it be by the intervention of a third person, is an accessory before the fact, and within these statutes. For what is there in the notion of commanding, hiring counselling, aiding, or abetting, which may not be effected by the intervention of a third person, without any direct immediate connexion between the first mover and the actor. It is a principle in law, which can never be controverted, that he who procures a felony to be done is a felon. If present he is a principal; if absent, an accessory before the fact.

The best writers of the crown law agree that persons procuring, or even consenting beforehand, are accessaries before the fact. See 2 Hawk. P. C. c. 29. s. 1; 1 St. Tr. 335; 1 Russ. 43; 5 Com. Dig. Justices, T. 1; 4 Bl. Com. 37.

2. THE KING v. HIGGINS. M. T. 1801. K. B. 2 East, Rep. 5.

The defendant had been convicted at the Quarters Sessions on an indictment charging him "with having falsely, wickedly, and unlawfully solicited and incited one J. D. to steal the goods and chattels of S. D. his employer." On a writ of error being brought, it was contended for the defendant that a bare solicitation of another to commit an offence was not indictable, unless some visible act was done by the party instigated towards the completion of the principal crime; that in the present case nothing appears on the face of the indictment beyond a charge against the prisoner of having fruitlessly and ineffectually incited J. D. to rob his master. It is not shown that any act was done in furtherance of this design, or that the solicitations were in any manner complied with. In support of the conviction at the Quarter Sessions it was argued that an attempt to commit a crime was in itself an indictable offence; that the defendant had not been prosecuted as an accessory before the fact, which he clearly might have been, had the contemplated robbery been committed, but merely for the misdemeanor, in having, by incitements, endeavoured to persuade another person to be guilty of felony.

Per Cur. The whole argument for the defendant is derived from an exceedingly fallacious source, from the unwarrantable assumption that no act is charged in the indictment to have been committed by the defendant, when he

* As to how far an accessory is implicated when the principal deviates from the terms of the instigation, see 1 Hale, 617; 4 Bl. Com. 37; 2 Hawk. c. 29. 120. and Fost. §69. §70; Plowd. 475; Keb. 109. 117. From these authorities the following general rules may be collected, that he who commands or counsels another to commit an unlawful act is liable to all the natural and probable consequences which may arise from its perpetration; thus if A. commands B. unlawfully to beat C., and B. beats C. till he dies, A. is accessory to the murder; so if A. command B. to rob C. and he kill him in the attempt, or to burn one house and the fire destroys more, A. will be accessory to the subsequent felonies. But the procurer will not be liable if the agent commit a crime of a different complexion, or upon a different object, than that to which he was incited. Thus if A. commands B. to burn a certain house, with which he is well acquainted, and he burns another; or to steal a certain horse, and he steals a different horse, or a cow; or to rob a man of plate on a journey, and he breaks open his house in the night in order to steal it, and thereby commits burglary, A. will not be liable to be indicted as accessory to the crimes committed, because B. knowingly acted contrary to the commands of A. it is on his part a mere ineffectual temptation, and the specific crime he planned was never completed. But if the variance of B. be merely a deviation in circumstance or place, as if A. procure him to murder C. by poison, and he kills C. with his sword, A. will be an accessory to the crime, for the means used are immaterial, so that the criminal object be effected; and though it has been said that if A. command B. to poison C., and B. in mistake poisons D., that A. is not answerable, this seems a position hardly reconcilable to the reason of the case, nor borne out by the authority cited to support it; for the true criteria to determine whether the instigator of a felony is guilty, as accessory to a felony somewhat different, are, that if the principal committed the crime in consequence of the flagitious advice, and if the event in the ordinary course of things was the natural consequence of the acts suggested, A. is unquestionably guilty; but if the agent, from the mere wickedness of his own mind, intentionally commits a different offence, A. will not be implicated in the guilt of the principal. See Saunderson's case, 15 Vin. Ab. 512; 1 Russ. 45. And that analogous principles obtain in trespass, see 1 East, Rep. 106. As to the effect of an accessory repenting and countermanding his previous orders, see 1 Hale, 617; 1 Russ. 48.

is distinctly charged with having incited another to transgress the law by the commission of a felony. Does not the solicitations constitute an act? Are those solicitations obliterated by the non-completion of the defendant's original design? Is it not an endeavour or an attempt to commit a crime, manifested by an avowed and open act? Can it be said to be mere intention, when positive measures are adopted towards carrying that intent into execution? The doctrine laid down in *Rex v. Schofield* (Cald. 397) comprises all the principles of the former decisions, and which must entirely govern the present case, that so long as an act rests on bare intention it is not punishable by our laws; but immediately when an act is done, the law judges not only of the act done, but of the intent with which it is executed; and if accompanied with an unlawful and malicious intent, though the act itself would otherwise have been innocent, the intent being criminal, the act becomes criminal and punishable. Judgment affirmed. See *Fost.* 125, 195; *Poph.* 134. 1 *Salk.* 380; 6 *Mod.* 182, 288; 2 *Lord Raym.* 1116; 3 *Salk.* 42; 2 *Show.* 1; 2 *Hawk.* c. 8. s. 3^d.

A man may make himself an accessory after the fact to a larceny of his own goods or to a robbery on himself, by harbouring or concealing the thief, or assisting in his escape. In an indictment against an accessory after the fact, an averment of his knowledge of the principal's guilt is indispensably requisite. It is unnecessary in a separate indictment against an accessory to state the judgment pronounced on the principal.

III. AFTER THE FACT.

M'DANIEL'S CASE. 1755. *Old Bailey.* *Fost.* 123; *S. C.* 10 *St. Tr.* 417.

Per Foster, J. It has been holden, and I think right, that a man may make himself an accessory after the fact to a larceny of his own goods, or to a robbery on himself, by harbouring or concealing the thief, or assisting in his escape.

IV. PROCEEDINGS AGAINST.

(A) INDICTMENT.

1. *THE KING v. THOMPSON.* *M. T.* 1676. *K. B.* 2 *Lev.* 208; *S. C.* 3 *Keb.* 674, 375.

A writ of error was brought on an indictment, which charged "that the defendant did *scienter* receive and harbour divers robbers, to the jury unknown, who had stolen a quantity of goods, and committed divers burglaries." It was argued that the judgment must be reversed, as the allegation *scienter* received did not sufficiently charge the offender with a knowledge of the guilt of the principals; that it ought to have been averred "that he, knowing them to be robbers, received them," for he might know the men, and not know them to be robbers. *Sed non allocatur*; for *per Cur.* Perhaps the felons, no more than the felonies and burglaries, could not be known particularly, and a house that harbors felons is a common nuisance. The averment of the prisoner's knowledge is sufficient. See 1 *Hale*, 662; *Hawk.* 62. c. 29. s. 33; *id.* 62. c. 25. s. 67; *Com. Dig. Justices*, T. 2; *Precedents*, *Petersdorff's Index*; and 1 *Leach*, 515.

2. *THE KING v. MICHAEL HYMAN.* 1801. 2 *Leach*, 925; *S. C.* 2 *East. P.* C. 782.

This was a motion in arrest of judgment. The indictment stated, that at,

* An accessory after the fact is usually defined to be a person who knowing (*Dyer*, 855; *Staunf.* 414; 3 *Pr. Wms.* 196;) that a felony has been committed (1 *Hale*, 622; *Hawk.* P. C. b. 2 c. 29. s. 35;) receives, relieves, comforts, or assists the felon. (1 *Hale*, P. C. 618; 4 *Bl. Com.* 37; *Com. Dig. Justices*, T. 2; 1 *Russel*, 49.) At common law there could be no accessories after the fact to any petit larceny misdemeanor, or trespass; (1 *Hale*, 618;) and prosecutions against accessories after the fact have been for many years discontinued, and would seem seldom to have been effectual. (*Fost.* 372.) But, by several modern statutes, the receivers of stolen goods are now expressly made punishable. See post, tit. *Receivers of Stolen Goods*.

† The accessory and principal may be indicted in the same indictment and tried together, and as the crime of the former depends upon the guilt of the latter, it is both usual and proper to include them in the same indictment. (See 2 *Hawk.* P. C. c. 29. s. 47; 1 *Hale*, 623; *Fost.* 365.) But when the accessory is brought to his trial after the conviction of the principal, it is not necessary to enter into a detail of the evidence on which the conviction was founded. Nor need the indictment aver that the principal was in fact guilty. It is sufficient if it recite, with proper certainty, the record of the conviction. This is evidence against the accessory sufficient to put him upon his defence; for it is founded upon a legal presumption that every thing in the former proceeding was rightly and properly transacted. But a presumption of this kind must, as it seems, giving way to facts manifestly and clearly proved. (*Fost.* 366.)

&c. on, &c. J. B., according to due course of law, was tried and duly convicted upon an indictment, &c.; that he, together with S. G. did feloniously and burglariously break and enter the dwelling-house of W. K. &c. As by the record, &c. will more fully and at large appear. And that the prisoner, after the felony was committed, on, &c. did receive and have part of the property so burglariously obtained; he the said prisoner well knowing the same to have been feloniously taken away.

In support of the application it was contended that the indictment could not be sustained, as it ought to have stated not only that the principal was "tried and duly convicted," but have distinctly shown what judgment was pronounced against him. But the Court, upon reference to a great number of precedents, [106] and on examining the statute of 1 Anne, st. 1 § 2. c. 9, s. 1 & 2 unanimously held that the indictment was good. See 4 Co. 436; 9 Co. 117; Rex v. Burder, 5 T. R. 83; Holmes v. Walsh, 7 T. R. 465; Fost. 73; and post, tit. "Receiver of Stolen Goods."

(B) TRIAL.

1. THE KING v. DANNELLY AND VAUGHAN, M. T. 1816, Ex. Chamb. 2 Marsh, 571; S. C. 1 Russel, 40.

John Dannelly and George Vaughan were tried at the Old Bailey Sessions, Sept. 1816, Dannelly being indicted for the burglary in the house of Mr. Poole, and Vaughan as accessory before the fact to the said felony and burglary. It appeared, that by a previous concert between Dannelly and Vaughan and a person named Barrett, Dannelly accompanied three other men, who went to rob Mr. Poole's house, Vaughan and Barrett watching in a passage on the opposite side of the street, and the purpose of Dannelly, Vaughan, and Barrett, clearly being to procure a burglary to be committed by the three other men, and afterwards to apprehend and convict them, in order to get shares of the rewards. Mr. Poole's house was robbed, the three men who accompanied Dannelly were almost immediately apprehended by Vaughan and Barrett, and had been tried at a former sessions at the Old Bailey for burglary, but were convicted only of stealing in a dwelling-house to the amount of 40s. in consequence of Mr. Poole's evidence as to its being possible, at the time the robbery was committed, to see a person's face by the light of day.

Upon the present indictment against Dannelly and Vaughan the jury acquitted Dannelly of the burglary, but found him guilty of stealing in the dwelling-house to the amount of 40s. and they found Vaughan guilty as an accessory to the "said felony and burglary," the charge stated in the indictment. Upon this finding an objection was taken that it could not be larceny in Dannelly, because it was not done *animi furandi*; and on behalf of the prisoner Vaughan, it was argued that as the indictment was against him as an accessory to a burglary committed by Dannelly, and as the jury had acquitted the principal of the burglary, the charge against the accessory must necessarily fall. That the offence of an accessory, though distinct, is yet derivative from that of the principal, and may be considered as the shadow of a substance. That by the reversal of an attainder against the principal, the attainder against the accessory, which depends upon the attainder of the principal, is ipso facto utterly defeated and annulled; and that though the charge against the accessory in this indictment, of which the jury had found him guilty, is as accessory to the "said felony and burglary," yet that the word felony, as thus used, is only descriptive of the character of the burglary, and by no means applies to any other or different offence. That an indictment against an accessory to a murder, the charge would be laid against him as accessory to the "said felony and murder," but would not import two crimes, or any other crime than that which the law denominates murder. That upon the whole, therefore, the charge against Vaughan could only be considered as a charge of being accessory to a supposed burglary by Dannelly; and that as the jury had negatived such burglary, they ought consequently to have acquitted Vaughan. Mr. Baron Graham, who tried the prisoners, respited the judgment upon these objections, which, in the following Michaelmas Term, were argued before the

Where the jury have acquitted the principal of burglary, and found him guilty only of stealing in the dwelling-house, they cannot find the accessory guilty as accessory to the "said felony and burglary," but must acquit him also.

An indictment against an accessory to a felony committed by a person unknown, cannot be supported if it appears that the allegation is untrue.

An averment of the conviction of the principal felon is supported by the production of the record of his attainder, however erroneous the judgment may be.

An accessory may controvert the propriety of the conviction of his principal by *visa voce* testimony; or show that the principal was entirely innocent.

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twelve judges in the Exchequer Chamber. The opinion of the judges was not formally communicated, but it is understood to have been unanimous in favour of the objection on behalf of Vaughan, and in proportion of ten to two in favour of the objection on behalf of Dannelly.

2. *REX v. WALKER*, 1812, 3 Campb. N. P. C. 264.

This was an indictment against an accessory before the fact, in which it was alleged that the felony was committed by a person to the jurors unknown; but it appearing that the principal felon had himself been a witness examined before the grand jury, and had there acknowledged his guilt,

Le Blanc, J. held, that the indictment was inapplicable to such a case, the principal being known at the time of the finding of the bill; and ordered the prisoner to be acquitted. See 2 East, P. C. 651, 281; 1 Russ. 52.

3. *REX v. BALDWIN*, 1812, 3 Campb. 265.

The indictment in this case alleged that the principal felon had been duly "convicted." To support this averment, an examined copy of the judgment was produced, which was defective in point of form; and concluded, "and the said I. P. (the principal) in mercy, &c." It was contended that this document was not sufficient to support the charge in the indictment.

But *Thompson, B.* held that the production of the judgment was necessary, and might be rejected, that the conviction alone was sufficient.*

See *Lord Fouchar's case*, 9 Co. 119; 1 Hawk, P. C. 29, s. 40; 1 Hale, 625; *Rex v. Smith*, 1 Leach, 288; *Fost.* 364 to 367; 1 Phil. Ev. 248, 3d ed.

4. *THE KING v. SMITH*, 1783, Old Bailey, 1 Leach, 288.

A prisoner was indicted on the stat. 3 W. & M. c. 9, s. 4, and 5 Anne, c. 3, s. 5, as accessory after the fact in receiving a quantity of flour, knowing it to have been stolen. It appeared that one of the principals had been convicted of the felony on the evidence of another who had been concerned in it. At the trial the record of the principal's conviction was produced, but on the authority of *Mac Daniel's case*, (*Fost.* 121,) the Court permitted the prisoner to controvert the propriety of that conviction by *visa voce* testimony; and it appearing that the prosecutor had intrusted the principal felon with the flour in such a way as to make the conversion of it a breach of trust only, and not a felony, the prisoner was acquitted.

6. *COOK v. FIELD*, H. T. 1788, 3 Esp. 134.

It was stated, in this case, by counsel, as a clear rule, and assented to by *Lord Kenyon*, that where the principal has been convicted, it is nevertheless, on the trial of the accessory, competent to the defendant to prove the principal innocent.

* "The judgment upon an indictment must be taken to be good until it is reversed by a writ of error, as in the case of proceedings against the accessory; so, if there be a judgment against the husband for treason not reversed by error, it is sufficient to deprive the wife of her dower." Per *Lawrence, J.* in *Holmes v. Walsh*, 7 T. R. 465; see 1 Hale, 265; 4 Co. 436; 9 Co. 119.

† *Mr. Justice Foster*, p. 336. thus illustrates the position above extracted from the case of the *King v. Smith*. "A. is indicted for stealing a quantity of live fish, the property of B.; A. pleaded guilty upon his arraignment, is immediately burned in the hand and discharged. At the next sessions C. is indicted as an accessory to A, in this felony after the fact, as the receiver knowingly; A. is produced as a witness against him, and, in the course of his evidence, proves, that the fish were taken in a river, of which B. had the sole and separate fishery, or in a large pond upon the waste of B. Might not C. had been so advised, have insisted, that the fish being at their natural liberty, B. had no fixed property in them, and consequently, that the taking of them in that state could amount to no more than a bare trespass. Undoubtedly he might."

‡ How far the accessory can avail himself of a defence arising from the total innocence of the principal, the same learned judge says, is a question of more difficulty; though he is of opinion, that if it shall manifestly appear, in the course of the accessory's trial, that in point of fact the principal was innocent, common justice requires that the accessory should be acquitted." He then puts the following case:—A. is convicted upon circumstantial evidence, strong as that sort of evidence can be, of the murder of B.; C. is afterwards indicted as accessory to this murder; and it comes out upon the trial, by incontestable evidence, that B. is still living; (*Lord Hale* somewhere mentions a case of this kind;

6. THE KING v. PROSSER, 1784; 1 Leach, 290, n. a.

A prisoner was indicted as an accessory before the fact, in procuring one R. to counterfeit an halfpenny; the record of R.'s conviction was produced, and it was admitted by Mr. Justice Gould, upon the authority of Foster, that the record of the conviction of the principal was not conclusive evidence of the felony against the accessory, and that he had a right to controvert the propriety of such conviction, for a record is only conclusive evidence against those who are parties to it.* But he gave no positive opinion on the point.

7. THE KING v. HASLAM, 1786, Old Bailey, 1 Leach, 418. S. P. PATRAM'S CASE, 2 East, P. C. 782; PRICE'S CASE, 1 Leach, 119, n.

On an indictment on the stat. 22 Geo. 3, c. 58, against an accessory, for receiving stolen goods, a question arose, whether the principal could legally be received as a witness against him; and the twelve judges were unanimously of opinion, that his testimony was, under such circumstances, admissible.

See Wild's case, 2 East, P. C. 782; case of Bilmore and others, 2 Hale, P. C. 279; Gunston and Downes, 2 Rol. Ab. 385, pl. 3; Bath v. Montague, cited Fost. Rep. 247; post, tit. "Receiver of Stolen Goods."

(C) PUNISHMENT.

REGINA v. WHISTLER, M. T. 1701, K. B. 2 Ld. Raym. 846.

If a statute take away clergy from aiders and abettors, yet accessories shall have their clergy.

Accident.

1. BECKWITH v. SHARDRIKE AND ANOTHER, E. T. 1767, K. B. 4 Burr. 2093.

Trespass for entering the plaintiff's close, with guns and dogs, and killing the plaintiff's deer; plea not guilty, and verdict for the plaintiff, with 30*l.* damages. The evidence to prove the defendant's guilt was, that they entered with guns and dogs into a close of the plaintiff's, adjoining to his paddock, and were not going along a foot path; that their dog happened to escape from them, and run into the plaintiff's paddock, and there pulled down and killed one of his deer. A motion was made for a new trial; as the judge who tried the cause was of opinion, though he did not direct to that purport, that the jury ought not to have found the defendants guilty, it being an accidental encroachment beyond their control, and contrary to their inclination.

Per Cur. Cases of this nature must depend entirely upon the particular circumstances, disclosed by the evidence in the course of the trial. The question here is, whether the persons who were the owners of the dogs which occasioned the mischief, whilst in their company, were or were not trespassers. The jury were to judge *quo animo* the party entered the plaintiff's close, and to determine whether it was an intentional trespass, or merely an involuntary accident. But as the damages are small, it is not worth while to set the verdict aside, upon payment of costs, and put the parties to the expense of a new trial. Mr. Justice Aston adverted to the distinction between voluntary and involuntary trespasses, pointed out in Fuller v. Fandage, Poph. 161. The defendant there, with a little dog, chased the plaintiff's sheep out of his ground, (where they were trespassing,) and drove them off his own ground; they went into another man's ground which had no hedge to divide it from the defendant. 2 Hale's P. C. 290.) is C. to be acquitted or convicted? The case is too plain to admit of a doubt. Or, suppose B. to have been in fact murdered; and that it should come out in evidence, to the satisfaction of the Court and Jury, that the witnesses against A. were mistaken in his person, (a case of this kind I have known,) that A. was not, nor could possibly have been present at the murder. It must be admitted, continues Mr. Justice Foster, that mere *alibi* evidence lies under a great and general prejudice, and ought to be heard with uncommon caution; but if it appears to be founded in truth, it is the best negative evidence that can be offered; it is really positive evidence which, in the nature of things, necessarily implies a negative, and in many cases it is the only evidence which an innocent man can offer. What, in the case above put, are a Court and jury to do? If they are satisfied, upon this evidence, that A. was innocent, natural justice and common sense will suggest what is to be done in the case of C.

* See 1 Phil. Ev. 242. 3d ed.

The record of the conviction of the principal is not conclusive evidence of the felony against the accessory.

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The principal is a competent witness against the accessory in all cases, where the latter may be indicted before the former.

A statute which takes away clergy from aiders and abettors, does not, by those words, include accessories at the fact. A party is not liable for an unavoidable accident.

[110] ant's grounds, which were contiguous. The dog pursued them into the other man's land, so next adjoining. The defendant, as soon as the sheep were out of the defendant's own land, called in his dog and chid him. The owner of the sheep brought an action of trespass for chasing his sheep. The Court gave judgment *quod quærens nil capiat. per Billam*, being of opinion "that trespass did not lie in that case," for they held it to be an involuntary trespass; whereas a trespass that is incapable of being justified ought to be done voluntarily. They thought he might lawfully drive the sheep out of his own land, with his dog, and he did his best endeavour to recall the dog when they were driven out of it; but from the nature of the animal he could not be withdrawn and recalled in an instant; therefore trespass could not be supported against him.

3. DAVIS V. SAUNDERS AND OTHERS, M. T. 1770, K. B. 2 Chit. Rep. 639.

Or where
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Action of trespass; the first count in the declaration alleged, that the defendant took and converted a large quantity of spirituous liquors belonging to the plaintiff, to his own use; the second count stated, that the defendant, with force and arms, broke, damaged, and spoiled a ship of the plaintiff's, whereby he was put to great expense in repairing her, and prevented from using her for a long space of time; plea, general issue, not guilty. At the trial a verdict was found for the defendants, on the first count of the declaration, and for the plaintiff on the second, subject to the opinion of the Court on the following case. The plaintiff and defendants, respectively, were the owners of certain vessels; and having heard that some smugglers had deposited a raft of brandy in the sea, several ships, among others the vessels of the plaintiff and defendants went out to endeavour to find the contraband spirits; and whilst the plaintiff was drawing up some of the casks, the defendants in one boat, and C. and B. in another, came up, and obtained possession of part of the raft, and while accomplishing the object, from the blowing of the wind, their ship came in contact with that of the plaintiff, and did the vessel considerable damage; the casks which were taken were removed to the custom-house, and afterwards condemned, no one claiming them.

The question reserved for the opinion of the Court was, whether the plaintiff was entitled to recover. And after argument—they determined, that as the original act of the defendant was lawful, and the injury merely accidental, the defendant was entitled to a general verdict upon the whole declaration.—Judgment for defendant.

3. BUTTERFIELD V. FORRESTER, E. T. 1809, K. B. 11 East, 60.

Or an injury is occasioned by the want of ordinary care on the part of the plaintiff:

[111]

In an action for obstructing a highway, by means of which the plaintiff was injured, it appeared in evidence on the trial, that the defendant had put up a pole across that part of the road along which the plaintiff was riding; but that a free passage was left in another part, which the plaintiff might have seen, and thus avoided the alleged obstruction, had he not been riding along the street without ordinary care and attention to his own safety; a verdict was found for the defendant. A motion was now made for a new trial, on the ground that the jury had been misdirected, in being told that two things must concur in order to support such an action; an obstruction in the road by the misconduct of the defendant, and no want of ordinary care on the part of the plaintiff. But the Court, concurring in the opinion delivered at the trial, refused the rule. See Bull, N. P. 26.

4. FLOWER V. ADAM, E. T. 1810, C. P. 2 Taunt. 314.

Or ordinary skill.

It appeared, in this case, that some bricklayers employed by the defendant had deposited a quantity of lime rubbish before his door; that while the plaintiff was passing in a single horse chaise, a violent gust of wind scattered the lime rubbish about the street, and frightened his horse, which it was proved was usually quiet and tractable, and that the animal started one side, and would have run against a wagon which was then advancing; the plaintiff, however, hastily and unskillfully pulled him round, and the horse then ran over a lime heap lying before the door of an opposite house; by this shock the shaft of the vehicle was broken, and the horse being still more alarmed, ran away.

and overset the chaise and the plaintiff was thrown out and materially hurt. At the trial a verdict was found for the defendant. A rule nisi was now applied for to set aside the verdict. *Set per Cur.* The jury were, at the trial, directed to find for the defendant, if they were of opinion that the unfortunate occurrence was occasioned, either by pure accident, or owing to the plaintiff not being a skilful driver; but that if they were of opinion that there was blame or negligence in placing the lime on the spot where it was deposited, they would find for the plaintiff. The injury, however, is too remote to affect the present defendant, and we think it must be ascribed either to accident or inability in the driver. R. Ref. See *Bush v. Steanman*, 1 B. & P. 404.

D. WALEMAN v. ROBINSON, E. T. 1823. C. P. 1 Bing. 213.

In trespass for driving against the plaintiff's horse, and injuring him with the shaft of a gig; plea, the general issue, and a special justification; replication *de injuria sua propria*. But any other least blame on the part of the defendant will deprive him of the protection of the preceding rule.

It appeared in evidence, that the defendant was driving a young horse in a gig, without a curb-chain, when a gig, a waggon and horses of the plaintiff, and a stage coach, all met at the same spot, when, in consequence of the defendant in his alarm pulling the wrong rein, his horse was suddenly turned against one of the horses in the waggon, and by a wound received in that percussion, the animal shortly afterwards died. The defendant attempted to prove that the accident happened without any fault being imputable to him, and that it was altogether unavoidable; but having failed in making out this defence, and supporting his special plea of justification, the judge before whom the cause was tried directed the jury, that under the circumstances of the case the special plea not being made out, the defendant could have no defence, because, in an action of trespass, whether the cause of the injury arose through inadvertence or not, it could not prevent the plaintiff from succeeding; and accordingly a verdict was found by the jury for the plaintiff.

On a motion for a new trial, on the hypothesis that it should have been left to the jury to consider whether the accident was occasioned by the negligence of the defendant, or was wholly unavoidable; for if the injury, it was contended, had happened entirely through inevitable accident, and without negligence on his part, the action could not be maintained. [112]

Par Cur. We admit that no action lies for an unavoidable accident, but if any blame at all be imputable to the defendant it may be supported; the present suit is an action of trespass, and we are of opinion that the trespass was clearly made out by the evidence against the defendant. It has been argued, on the facts of this case, that the defendant is not liable in any form of action; but it is a well established rule of law, that no one can be excused from the consequences arising from a trespass, unless he can show that trespass to have happened entirely without fault on his part; here, however, it is distinctly proved that the accident was occasioned by an act of the defendant himself, and the weight of evidence satisfactorily demonstrated that it was through his unskilfulness; granting a new trial would be against the real justice of the case, and the rule must therefore be discharged. See *Weaver v. Ward*, Hob. 134; *Leame v. Bray*, 3 East, 593; *Gibbons v. Pepper*, 1 Ld Raym. 38; *Scott v. Shepherd*, 2 Elac. 802; S. C. 3 Wils. 403; *Day v. Edmond*, 5 T. R. 648; *Ogle v. Barnes*, 8 T. R. 183; *Harker v. Birbeck*, Burr. 1556; *Tullege v. Wide*, 3 Wils. 18; *Woodward v. Warlton*, 2 N. R. 378; *Underwood v. Hewson*, 1 Stra. 596.

6. *DIXON v. BELL*, E. T. 1816, 1 Stark. 287.

Case for negligently entrusting a girl with a loaded gun, whereby the son of the plaintiff was wounded, and the plaintiff put to expense in effecting his cure. It appeared by the evidence adduced on the part of the plaintiff, that the defendant had sent a verbal message by a child twelve years old to A. B. to deliver a gun to her, but requested him not to give it to the child until he had removed the priming. A. B. on examining the gun could discover no priming, and accordingly delivered the instrument to the child, who imagining that it was unloaded and harmless, presented it at the plaintiff's son, when it went into his hand, and he was wounded. It is the duty of a party, before he trusts a dangerous instrument in the hands of an inexperienced person, to see that it is unloaded and harmless.

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off, and occasioned the injury sought to be redressed by the present action. Per Lord Ellenborough. I think the defendant, in only desiring A. B. to remove the priming, which request was complied with, did not go far enough. It was incumbent upon him to have directed A. B. to render, by a careful examination, the gun perfectly harmless and innoxious. Verdict for plaintiff.

The Court afterwards refused to set the verdict aside.

Accomplice.—And see tit. *Aiders and Abettors*.

1. *REX v. WESTBERR*, 1739, 1 Leach, C. L. 12.

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Upon the trial of an indictment for stealing a parchment writing, purporting to be a commission for ascertaining the boundaries of certain manors, pursuant to an order of the Court of Chancery; it appeared that one C. L. an accomplice, had made a full confession, and in that confession had declared the guilt of the prisoner, but before the trial of the latter the accomplice had died in prison. Upon the depositions being tendered in evidence, it was objected on behalf of the prisoner, that such a confession could not be received in evidence, for if it were admitted, it would be highly prejudicial to him, as he would be deprived of the benefit of a cross examination. But,

Per Cur. The deposition is admissible as evidence against the prisoner, though it will not be conclusive unless other evidence is produced corroborative of that afforded by the confession of the accomplice. See 2 Russell on Crimes, 1112; 2 East, P. C. c. 16. s. 34, p. 596; 1 Lev. 180; Salk. 281; 1 Hale, 305; 2 Hawk. 605; 2 Jones, 53; Foster, 337; Cro. Eliz. 901; Kel 55; Bul. N. P. 242; 1 Phil. Ev. 296. 3d ed.

2. *THE KING v. RUDD*, T. T. 1775, K. B. 1 Leach, C. L. 115; S. C. Cowp. 331.

[113]
A prisoner
committed
as an ac
complice in
repeated
forgeries
cannot be
admitted to
bail when
the time of
the trial is
near. The
ill health of
such a pris
oner, is not
of itself a
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circum
stance to in
duce the
Court to ad
mit to bail;
nor will the
Court bail
an offender
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full and fair
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To a *habeas corpus* directed to the keeper of Newgate, he made a return that the prisoner was in custody by two orders of the court of session and gaol delivery at the Old Bailey, for the forgery of two several bonds; and also, that she was further detained, by a warrant from a justice of the peace, for uttering one of those bonds, knowing it to be forged. Upon this return a motion was made to bail the defendant, upon the ground of her having been admitted, and even examined, as a king's evidence against the Perreaus. In support of the application an affidavit from the justices was produced, in which it was sworn, "that they admitted her as a general witness for the crown, as to all the forgeries; that they told her if she would speak the truth, and the whole truth, not only in respect of the bond in question, but of all the other forgeries, that then she would be safe; if not, she would be prosecuted." That upon her confession she acknowledged herself a *particeps criminis* in the forgery of a bond for 7500*l.*; for "that Perreau came in with a knife to her throat, and threatened to kill her if she did not forge one of the bonds in question; that under the fear of death she forged it; and that Perreau brought the bond ready filled up; but denied having any knowledge of, or concern in any of the other bonds. The counsel for the defendant contended that she might be admitted to bail on three grounds: 1st. By the general discretion of the Court; 2d. Because her health would be endangered by confinement; and 3d. Because she had been induced by promises and assurances to answer to an examination, and to swear it on oath, which she would not have done, but from a confidence that these promises and assurances would have been fulfilled.

Per Cur. As to the first point, though this Court has undoubtedly a discretionary power to bail in all cases, yet when the sessions are near, and the offence committed by a prisoner is of such enormity as that of repeated forgery, there is no colour for an application for bail upon the ground of our general discretion; Secondly, As to the allegation, that her state of health is such as to be endangered by the confinement, it is not of itself a sufficient circumstance, in such a case to induce the Court to interfere in her behalf.

As to the Third ground, instances have before frequently happened, of persons having made confessions under threats or promises, but the consequence has been, that such examinations and confessions have not been made use of against them on their trial, it has, however been urged, that the prisoner, in

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this case, is an accomplice, who has been admitted to give evidence; that she has already given evidence, and is further ready to give evidence to convict her partners in guilt; and therefore entitled by law to the king's pardon, which would operate in bar of her own crime; if she had such right we should be bound *ex debito justitiæ* to bail her; if she had not such legal right, but yet came under circumstances sufficient to warrant the Court in saying, that she had a title of recommendation to the king for pardon, we should bail her for the purpose of giving her an opportunity for applying for a pardon. There are three ways in law and practice which gives accomplices a right to pardon, and there is one mode which entitles them to a recommendation to the king's mercy.

The three legal ways are, 1st. in the case of approvement, which still remains a part of the common law, though, by long discontinuance, the practice of admitting persons to be approvers is now grown into disuse. 2dly. The case of persons who come within the statutes 10 & 11 Will. 3. c. 23. § 5. and 5 Ann. 6 c. 31. § 4; and 3dly. The case of persons to whom the king has by special proclamation in the Gazette, or otherwise promised his pardon. Approvers have a right to a pardon, persons within the statutes of Will. & Ann. have a right to a pardon. There is, besides, a practice which indeed does not give them a legal right, and that is, where accomplices having made a full and fair confession of the whole truth are, in consequence thereof, admitted evidence for the crown, and that evidence is afterwards made use of to convict the other offenders, if, in that case, they act openly and fairly, and discover the whole truth, though they are not entitled of right to a pardon, yet the usage, the lenity, and the practice of the Court is, to stop the proceedings against them, and they have an equitable title to the king's mercy. The present case rests only on the equitable practice which gives a title to recommendation to the mercy of the crown. The law of approvement, in analogy to which this practice has been adopted, and so modelled as to be received with more latitude, is still in force, and is very material. A person desiring to be an approver must be indicted of the offence, and in custody on that indictment; he must confess himself guilty of the offence, and desire to accuse his accomplices; he must, likewise, on oath, disclose, not only the particular offence for which he is indicted, but all treasons and felonies with which he is acquainted. But even after this, it is in the discretion of the Court, whether they will assign him a coroner, and admit him to be an approver or not. For if, on his confession, it appears that he is a principal, and tempted others, the Court may reject him as an approver. When he is admitted as such, it must appear that what he has discovered is true, and that he has discovered the whole truth; for this purpose the coroner puts his appeal into form, and when the prisoner returns into court, he must repeat his appeal without any help from the Court, or from any bystander. The law, indeed, is so particular, that if he vary in a single circumstance, the whole falls to the ground, and he is condemned; if he fail in the colour of a horse, or in circumstance of time, so rigorous is the law, that condemnation immediately follows; much more if he fail in essentials. The same consequences follow if he does not discover the whole truth, and in all these cases the approver is convicted on his own confession. A further rigorous circumstance is, that it is necessary to the approver's own safety, that the jury should believe him; for if the partners in his crime are not convicted, the approver himself is executed. Great inconvenience arose out of this practice of approvement. If it was not absolutely necessary for the execution of the law against notorious offenders that accomplices should be received as witnesses, the practice is liable to too many objections to be tolerated; and though under this practice, they are clearly competent witnesses, their single testimony alone is seldom of sufficient weight with the jury to convict the offenders. What has been introduced as a substitute for the practice of approvement is a kind of hope, that accomplices who behave fairly, and disclose the whole truth, and bring others to justice, should themselves escape punishment, and be pardoned. This is in the nature of a recommendation to mercy; but no au-

thority is given to a justice of the peace to pardon an offender, and to tell him he shall be a witness against others. The accomplice is not assured of his pardon, but gives his evidence *in vinculis*, in custody, and it depends on the title he has from his behaviour whether he shall be pardoned or executed. A justice has no authority to select whom he pleases to pardon or prosecute; and the prosecutor himself has even a less power, or rather pretence to select, than the justice of the peace. It rests chiefly on usage and the offender's own good behaviour, whether he shall be prosecuted or not. If in a proper case an application is made to the Court by an accomplice to be bailed, that is, in the case of a person properly within the usage, and who has fully complied with the requisite conditions, this Court would have no difficulty in bailing him, in order that he might apply for the king's pardon. These are general rules; now what disclosures has the prisoner in the present case made? It is this, that, "under the fear of immediate death, she did forge one of the bonds in question." In this she is no accomplice; she has confessed no guilt, if the fact is true, for it is the will that constitutes the crime. She comes, therefore, in the character of a person injured, in the character of one to whom this violence has been done; instead of being a party offending, she is a party offended, as much as a man robbed on the highway. Further, the justices do not treat her as an accomplice, for they ought to have kept her in custody if she had been an accomplice; but they discharged her, and they did right, there being no accusation against her; but still they say in their affidavit they did consider her an accomplice. Suppose they did really think her guilty, she is not the more nor less on that account an accomplice; it is true, if she had made a fair and full disclosure of all that she knew, and the justices had deceived her under a promise, or assurance, or hope, of a pardon from them, she would be entitled to a recommendation to mercy, and in that case, we should be inclined to bail her, though the justices had in strictness no right to make such promise, or give her such assurance. If any evidence or confession has been extorted from her, it will not prejudice her at the trial.—Let her be remanded.

[116] Afterwards the defendant being brought to the bar at the gaol delivery at the Old Bailey, to plead to the indictments, the same objections were taken to the propriety of putting her upon her trial; and the judges differing in opinion, it was postponed, that the opinion of all the judges might be taken; and at the ensuing gaol delivery, Aston, J. delivered the opinion of the judges as follows;—Eleven of the judges (the Lord Chief Justice of the Common Pleas having been prevented attending through illness) are of opinion, that in cases not within any statute, an accomplice who fully and truly discloses the joint guilt of himself and of his companions, and truly answers all questions that are put to him, and is admitted by justices of the peace as a witness against his companions, and who when called upon does give evidence accordingly, and appears, under all the circumstances of the case, to have acted a fair and ingenuous part, and to have made a full and true confession, ought not to be prosecuted for his own guilt so disclosed by him, nor perhaps for any other offence of the same kind which he may accidentally and without any bad design have admitted in his confession. But he cannot by law plead this in bar to any indictment against him, nor avail himself of it upon his trial. It is merely an equitable claim to the mercy of the crown from the magistrates' express or implied promise of an indemnity upon certain conditions that have been performed; it can only come before the Court by way of application to put off the trial, in order to give the prisoner time to apply elsewhere. Nine of the eleven judges were of opinion, that all the circumstances relative to a prisoner's claim of indemnity in such a case, not only may, but ought to be laid before the Court, to enable them to exercise their discretion, whether upon the ground before them the trial should be put off, and consequently have intimated that the prisoner ought not to be prosecuted; for the discretionary power exercised by the justices of the peace in admitting accomplices as witnesses, founded in practice only, cannot control the authority of the court of gaol-delivery, and exempt at all events the accomplice from being prosecuted.

In cases not within 10 & 11 W. 3. if an accomplice is admitted by the magistrate to be a witness, and is afterwards prosecuted, he has only a claim to the mercy of the Crown on the promise of the magistrate, on a condition to be performed, that is if he fully and fairly discloses all knowledge relative to his companions.

Upon every motion made upon collateral equitable grounds, the Court will see and examine into the whole truth and consequently ought to be informed of all the circumstances affecting the case. The affidavit of the justices must therefore in this instance be necessarily taken into consideration, to see upon what ground they admitted the prisoner as a witness; and upon their affidavit it appears that the public faith was not engaged but conditionally, and that there was an express admonition given to the prisoner not to conceal any part of the truth. The same nine judges were also of opinion, that if the matter stood singly upon the two informations of the prisoner, compared with the indictment against her, that she ought to have been tried upon all or any of them; for, from the prisoner's information, she is no accomplice; she has not confessed herself guilty of any offence at all; by her representation, the share she had had in these transactions is perfectly innocent; and she answers to the justice's interrogation, that she does not know of any other forgeries; so she does not confess, make any discovery, or become a witness concerning these offences; and if she has suppressed the truth, and not made a full and fair disclosure, she forfeits all equitable claim to favor or mercy; but if she has told the truth, and the whole truth, she cannot be convicted. On the other hand, taking the affidavit of the justices, and all the case into consideration if she is guilty of the charge contained in the indictment, the judges are of opinion, as her information before the justices has no relation to these charges [117] they can in no light be applied to to mitigate her offences. Upon the whole, whether the prisoner is guilty or not guilty, is a fact still to be tried by a jury upon legal evidence, without prejudice to the prisoner from any thing which has been insisted upon in point of law by her counsel to exempt her from any trial at all; for it would be hard indeed upon the subject, who has a right to the advice and assistance of counsel, in all matters and points of law that may arise upon his case, if the eventual decision of the court against the points of law insisted upon in his behalf should prejudice the subsequent trial of the facts, which is ultimately to be governed by the rules of evidence, and to be decided by the verdict of the jury. It is only necessary to add, that an accomplice who desires his trial may be put off, that he may apply for mercy under all the most regular pretensions before laid down, confesses the guilt; but under the circumstances of this case, if the prisoner confesses the offences charged in these indictments, she has no promise of mercy, and no claim to favour for the reason aforesaid. The judges are therefore of opinion that the trial ought to proceed. See *Staunf. P. C. lib. 2 c. 52 to c. 58; 3 Inst. 129; 2 Hale, P. C. 236.*

3. *LUCKHURST'S CASE.* 1798. *cor. Buller*, cited *C. C. C. 58. 9th ed.*

A motion was made by counsel, as of course, that one Avery, an accomplice with Robert and William Luckhurst, on a charge of sheep-stealing, might be brought before the grand jury to give evidence on a bill of indictment; upon which Mr. Justice Buller said, that it was not a motion of course; and he therefore requested of the prosecutors counsel to read over the indictment and his brief, and afterwards as a professional gentleman to certify to him that there was not sufficient evidence to convict without the testimony of the accomplice, otherwise he would not allow the motion, because it might be the means of letting off the worst offender and punishing those to whom otherwise (according to circumstances) mercy might be shown. The prosecutor's counsel having taken time to consider the subject, moved again, and stated that this accomplice had been before admitted king's evidence against the others by the committing justice. But his lordship said that he would not pay any regard to that, because it was not in the power of a justice of the peace to say who ought or ought not to be admitted king's evidence; and added that he continued to adhere to his former observation, that it solely depended upon the question, whether the indictment could be found and supported without the evidence of the accomplice, and that if it could he ought not to be admitted; and that he should decide upon the counsel's saying upon his judgment whether it could or could not; thereupon the counsel said, that he thought the accomplice ought to be admitted as such evidence, and had his motion.

It is not a matter of course to admit an offender as a witness on the trial of his accomplices, even after he has been allowed by the committing magistrate; but a motion must be made for this purpose by the counsel for the prosecution.

An accom-

plice may

give evi-

dence be

fore the

grand jury

although he

may not

have been

previously

admitted a

witness for

the crown,

and was

carried be-

fore the ju-

ry by an il-

legal order

from the

prison to

which he

had been

committed

for the

same off-

fence.

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The decla-

rations of a

criminal at

the time of

his execu-

tion cannot

be received

on the trial

of an accom-

plice, for af-

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he could

not be

sworn as a

witness.

The testimo-

ny of an ac-

complice,

unsupport-

ed by other

evidence, is

sufficient to

convict the

principal.

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And this

rule obtains

in capital as

well as oth-

er cases.

4. THE KING v. DR. DODD. 1777. 1 Leach, C. L. 155.

An accomplice not regularly admitted as a witness for the crown, but carried before a grand jury by virtue of an order from the clerk of the arraigns, which order the judges afterwards declared had been surreptitiously obtained, and illegal. On an indictment for forgery being found against D. upon this testimony, he submitted, upon his arraignment, that the indictment being found upon improper evidence, he ought not to be compelled to plead it. But, by the unanimous opinion of the twelve judges on a case reserved, it was held that the necessity of a proper authority to authorise carrying a witness, who happens to be in custody, before the grand jury to give evidence, as regards the justification of the gaoler; but affords no objection as far as relates to the party indicted, for in respect to him the finding of the bill is right and according to law. See 1 H. P. C. 313; Hawk. b. 2. 46. 394; 4 St. Tr. 594. 4th ed. 663; 7 T. R. 609; 1 Leach, 14.

5. THE KING v. DRUMMOND. 1784. 1 Leach, 397; S. C. 1 East, P. C. 353.

During the trial of the prisoner, who was indicted for a robbery, it was suggested by his counsel, that a person who had been recently executed, had, immediately before the completion of his awful sentence, communicated something to the chaplain in ordinary of the prison respecting the crime for which the prisoner at the bar was indicted, and he submitted that such declaration of the deceased ought to be received in evidence.

Sed per Cur. To examine a witness concerning the declarations of an attainted convict would be to act in direct violation of the rule, that the dying declaration of a deceased party cannot, consistently with the principles of justice, be considered as better evidence than his testimony on oath would have been if he had been alive; and, as he would have been rejected when living as an incompetent witness, in consequence of the attainder, his dying declarations must be deemed equally inadmissible.* See 3 Burr. 1244; 1 Bl. Rep. 346; S. C. 1 Stra. 499; 2 Leach, 566; 6 St. Tr. 202; 9 id. 161; 6 East 195; 4 B. and A. 53; 1 Phil. Ev. 217; Arch. Crim. P. C. 73; 1 East, P. C. 357.

5. REX v. DURHAM AND CROWDER. 1789. 1 Leach, 478. S. P. REX v. JONES. 1809. 2 Campb. 132.

The prisoners were indicted for a burglary in a dwelling house; and the only witness produced for the prosecution was a person who had been in the practice for a series of years, of receiving stolen goods from a great number of principal offenders, and had been bound over by the justices to give evidence against the accused. An objection was taken to the admissibility of the testimony of the witness but overruled by Mr. Baron Perryn, who was of opinion that the testimony of an accomplice, even unconfirmed by any other evidence that could materially affect the case, was sufficient to warrant a conviction.

7. REX v. ATWOOD AND ROBBINS. 1788. 1 Leach, C. L. 464.

This was an indictment for a highway robbery. At the trial the prosecutor was unable to swear that the prisoners at the bar were the men who robbed him, the darkness of the night upon which the robbery was committed having prevented him from distinguishing them. The evidence of an accomplice was then admitted, and he proved that he and the prisoners committed the robbery; and his evidence accorded, as to the minor facts, with the statement made by the prosecutor.

The jury found the prisoners guilty, subject to the opinion of the Court,

* In Margaret Tinkler's case, 1 East, P. C. 354. to 356. it was adjudged that the dying declarations of an accomplice are admissible, where the accomplice himself would have been a competent witness, if he had been living. The majority of the judges were of opinion in that case, that the declarations of the deceased were alone sufficient evidence to convict the prisoner; on the ground that they were not to be considered as evidence coming from a *particeps criminis*, as she thought herself dying at the time, and had no view or interest to serve in excusing, or fixing the charge unjustly on others. But others of the judges held that her declarations were to be so considered, and therefore required the aid of confirmatory evidence.

Mr. Justice Buller afterwards stated it to be the unanimous opinion of the judges, that an accomplice is a competent witness to warrant a conviction, and that if the jury, weighing the probability of his evidence, think him deserving of belief, a conviction supported by such testimony alone is perfectly legal.*

8. **REX v. SWALLOW**, 1813, cited 1 Phil. Ev. 34.

Where a jury are satisfied that an accomplice speaks truth in those parts in Rule as to which they see unimpeachable evidence brought to confirm him, that is a testimo ground for them to believe that he also speaks truly with regard to the other any being prisoners as to whom there may be no confirmation. confirmed.

I. GENERAL RULES.

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(A) IN ASSUMPSIT, p. 128.
(B) — DEBT, p. 129.
(C) — COVENANT, p. 130.
(D) — TRESPASS, p. 133.

IV. REPLICATIONS TO, IN GENERAL, p. 136.

I. GENERAL RULES.

- In trespass, &c. the defendant pleaded an accord between him and the plaintiff, viz. that he should pay the plaintiff 3*l*. and should undertake to pay the attorney's bill; and averred that he had paid the 3*l*. and was always ready to pay the attorney's bill, if it had been shown to him. It was argued, that here the accord is executed; for the 3*l*. is paid, and the agreement is not to pay, but to undertake for the payment of the attorney's bill, which he has done; and that upon his undertaking the plaintiff or the attorney would have a remedy. But the accord not being executed, judgment was given for the plaintiff. See Dy. 75, b. 356, a. Plow, 5; 9 Co. 796; 1 Rol. 129, c. 12; 1 Rol. 471, c. 10; Cro. Car. 193; Bac. Accord, 7; 2 H. Bl. 317; 5 T. R. 720.

- In covenant on an indenture, in which defendant covenanted to permit the plaintiff to receive 100l. per annum rent, part of which was to go in satisfaction of a debt, and the residue to be paid to the defendant, and assigned a breach in disturbing him in the receipt of the rent; the defendant pleaded an accord between them that each should deliver his part of the indenture to T. S. to be cancelled, and that each should be discharged of all actions upon the

* See *Jordaine v. Lashbrooke*, 3 T. R. 699, where the above case is cited and relied on by Mr. Justice Grose, who said this is not a new law, nor founded upon new principles, for in 1 Hal. 302, 304, 305, there are different instances of convictions, one in 1672, of a conviction of Hyde and others of a robbery on the highway, on the testimony of one who was a party to the robbery, but not indicted.

- [121] said indenture, and averred that he delivered his part, &c.; and upon demurrer the plea was adjudged ill, because accord is no plea, unless executed on both sides.

3. ALLEN v. HARRIS, M. T. 1695-6, C. P. 1 Lord Raym. 122; S. C. Lutw. 1538.

Or a promise to pay the whole where the promises are not mutual.

To an action of trover, the defendant pleaded that the plaintiff, in consideration that the defendant, at the special instance of the former, had promised to pay to the plaintiff a certain sum; the latter had agreed to discharge the defendant of the tort, &c. stating mutual promises. To this plea the plaintiff demurred. For the defendant it was contended, that the old rule, that an accord with satisfaction ought to be pleaded as executed, did not apply to the present case. That an arbitrement might be pleaded without performance, because the parties may have reciprocal remedies.

Sed per Cur. If arbitrement be pleaded with mutual promises to perform it, though the party who brings the action has not performed his part, yet he cannot maintain the suit, because an arbitrement is like a judgment and the party may have his remedy upon it. But upon accord no remedy lies; (see James v. David, 5 T. R. 141; Lynn v. Bruce, 2 H. Bl. 317;) and the authorities are so numerous that an accord ought to be executed, that it is now impossible to overthrow all the decisions. See 15 Hen. 6, 1; 7 Edw. 4, p. 6; Raym. 203; T. Jones, 159; Cro. Eliz. 193; Dyer, 75, b. pl. 26; 1 Mod. 67; 2 T. R. 25; Carth, 188; Salk. 69; 1 Roll. Ab. 267; Lutw. 67.

4 FITCH v. SUTTON, T. T. 1804, 5 East, 330: S. C. by the name of Fetil v. Sutton, 1 Smith, 415.

An accord to pay a less sum than the original debt, at the same or on a subsequent day is not sustainable.*

- To an action for goods sold and delivered, there was a plea of non assumption. It was proved that the defendant, in consequence of his insolvency, had compounded with his creditors, but had promised the plaintiff to pay him the residue of his debt when he was of ability, which it was established in evidence that he now possessed. The defendant produced, on the other hand, a receipt signed by the plaintiff, in full of all claims and demands from the beginning of the world to that day. A verdict was found for the defendant, reserving the point whether an acceptance by a creditor of a less sum in satisfaction of a greater was a discharge of the debt, unless it were by deed. A rule nisi was now obtained to set aside the verdict. *Per Cur.* An acceptance of a less sum can never be a satisfaction of a greater, unless the acquittance be under seal, or unless there be some reason for relinquishment of the residue; something collateral to show a possibility of benefit to the party relinquishing his further claim. But the mere promise to pay the rest when of ability puts the plaintiff in no better condition than he was in before.
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See Heathcote v. Crookshanks, 2 T. R. 24; Knight v. Cox, cited 5 East, 231; B. N. P. 153; 1 Stra. 426; 5 Rep. 117; 4 Mod. 88; Co. Lit. 212, b; 1 B. & A. 103; 4 id. 440; 7 Price, 604; 8 Taunt, 227; 2 Camp, 124, 383; 11 East, 390-2; 2 Taunt, 124; Cro. Eliz. 364; 3 Camp, 175; 16 Ves. 372; 2 Lev. 81; 1 Esp. 236; post, tit. Composition with Creditors.

(B) MUST BE CERTAIN.

1. SANFORD v. SUTCLIFFE, E. T. 1688, K. B. Yelv. 124: S. P. RUSSELL v. RUSSEL, M. T. 1679, C. P. 3 Lev. 189.

Performance of an accord with certainty does not aid an accord that was uncertain in its foundation.

Covenant by the heir in reversion against executor of tenant for life, for breach of covenant by testator, in not repairing the house demised. Plea, that the testator tenant for life, died on such a day, and that afterwards it was agreed between the plaintiff and defendant that the latter should quietly depart and leave possession to the plaintiff; and in consideration thereof, the plaintiff agreed to discharge him from the breach, and averred that within five days from the day of agreement he left the house. On demurrer, the plea was holden to be bad; for the time was not fixed, by the terms of the agreement, when the executor should depart; and although it was averred that he

* But payment and acceptance in full satisfaction of a less sum either before the day or at another place than that mentioned in the condition, extinguishes the debt. Co. Litt. 212, b.

departed within five days, yet that would not aid the first uncertainty, for the agreement was the foundation of the whole, which ought to be certain as to when it should be performed.

2. *ADAMS v. TAPLING*, E. T. 1691, K. B. 4 Mod. 88.

In covenant the breaches assigned were, that the houses were not in repair; that the locks were taken away, the hedges broken down, and the ditches not scoured. Defendant pleaded an accord that he should employ a workman three or four days about repairing the house, which was to be accepted in satisfaction of the breach, and that he had employed a workman, &c. It was moved that this was no more than the defendant was obliged to do; that it was an answer only to the repairs of the house; and that the satisfaction pleaded is uncertain, viz. to employ a man for three or four days. And judgment was arrested; but (afterwards as it seems) the Court held, that in covenant, where the damages are uncertain, and to be recovered, as in this case, a lesser thing may be taken in satisfaction, and pleaded in bar.

(C) MUST BE WITH SATISFACTION.

JAMES v. DAVID, H. T. 1792, 5 T. R. 141.

Where to breaking and entering the plaintiff's close, the defendant pleaded "that in Easter Term last past, the plaintiff declared against the defendant in this cause for the several trespasses above supposed by the defendant to have been committed, and that afterwards, and before plea pleaded in this cause, to wit, on such a day, it was agreed between the plaintiff and defendant that the defendant was to pay 1*l.* 1*s.* on account of the matter in dispute, and the plaintiff was to pay the law charges; and further, that whatsoever disputes then were, or had, or might be, in being, touching suits, or actions, to the day of the date of the said agreement, should cease and terminate for ever; and they further agreed mutually to forfeit the sum of one hundred pounds; if either party should commence an action by suit, in respect of any thing in being at the then present day." It was then averred, that the present action and the action in the agreement mentioned were the same. On demurrer to this plea, it was contended in support of it, on the authority of an admission in *Reniger v. Forgassa*, Plow. 5, that an agreement, to constitute an effectual plea in bar, is either such an agreement as is executed and satisfied with a recompence in fact, or within an action or other remedy to execute it, and to recover a recompence; that here the parties agree to bind themselves in the penalty of 100*l.* to abide by their accord; that, therefore, was a new remedy, which fell directly within the authority cited. But the Court were of opinion that the plea was bad; for even supposing the proposition true, that whenever the agreement is such, for the breach of which action might be maintained, it may be pleaded in bar, yet it is incumbent on the party pleading it to show that an action could have been supported on it. In order to found an action on this agreement, the plaintiff must have stated not only the agreement, but also that he tendered an obligation in 100*l.* ready executed to the defendant, and that the defendant refused to execute, &c. but no action could have been sustained on this contract without that previous step, which is not pleaded here. See *Lynn v. Bruce*, 2 H. Bl. 307; post, tit. Composition with Creditors.

(D) THE CHATTEL GIVEN AS SATISFACTION MUST BE OF SOME VALUE IN LAW.

1. *PRESTON v. CHRISTMAS*, E. T. 1758, C. P. 2 Wils. 86.

To an action of debt upon a bond the defendant pleaded accord and satisfaction, viz. that he released to the plaintiff all his equity of redemption of certain tenements, in satisfaction of all bonds wherein he was bound to the plaintiff; and upon demurrer judgment was given for the plaintiff, because a release of an equity of redemption is of no value in a contemplation of law.

See S. P. Cro. Jac. 254.

2. *BACON v. DUBARY*, T. T. 1696, K. B. 1 Salk. 70.

Money paid and accepted in pursuance of a void accord may be pleaded or taken as an accord with satisfaction. Per Hale, C. J.

A release of an equity of redemption in satisfaction is not sufficient.

But if money be paid

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and accepted upon a void accord it may be pleaded as an accord and satisfaction.* A benefit to a third person at the request of the plaintiff is well enough. When the satisfaction proceeds entirely from a stranger, the accord is a nullity.†

(E) FROM WHOM THE SATISFACTION SHOULD MOVE.

1. HILLMAN v. UNCLES, M. T. 1692, K. B. Skin. 391.

Trespass *quare clausum fregit*, &c. The defendant pleads that the trespass was done by him and J. R. and that after the said trespass it was accorded between the plaintiff and the said J. R. that the said J. R. should abate one fourth due to the said J. R. from Edward, father to the plaintiff, in satisfaction of the said trespass, and avers that the said J. R. had abated the said one fourth &c. And upon this the plaintiff demurred, because it was a thing to be performed for the benefit of a third person. But the Court were of opinion that it being disadvantageous to one of the trespassers, and made at the request of the plaintiff, though it be a third person, it was well enough.

2. EDGECOMBE v. RODD AND OTHERS, T. T. 1804, K. B. 5 East, 294; S. C. 1 Smith, 515.

This was an action for false imprisonment against justices of the peace, who had committed the plaintiff under the Toleration Act, 1 W. & M. c. 18, s. 18. The defendants pleaded first not guilty, and also that the plaintiff having been committed for want of sureties by the defendants, the prosecution at the next sessions was, by agreement between the plaintiff and the prosecutor, with defendant's consent, abandoned, and the plaintiff thereupon discharged, in satisfaction of the said imprisonment. Demurrer, stating that it was not shown with what misdemeanour the plaintiff was charged by the said complaint, nor whether the complaint were in writing or upon the oath of the prosecutor or any other person, nor for what misdemeanor the plaintiff was committed. *See Per Cur.* Besides the grounds of objection to the pleas assigned in the demurrer, they cannot be supported, for the transaction was altogether illegal, as it was stifling a public prosecution; and the magistrate's jurisdiction over the plaintiff having terminated with the commitment, the consideration of the agreement, viz. the abandonment of the prosecution, moved not from the defendants but the prosecutors, and was therefore a nullity. Judgment for plaintiff. *See 2 Wils. 341-9; Rol. Ab. 471; Johnson v. Ogilby, 3 P. Wms. 279; Comber v. Wane, 1 Str. 426, cited 5 East, 290; Andrew v. Bonghey, Dy. 75, a; Collins v. Blantern, 2 Wils. 341.*

(F) SATISFACTION TO ONE OF SEVERAL.

DUFRESNE v. HUTCHINSON, T. T. 1810, C. P. 3 Taunt. 117.

Sens. The acceptance of satisfaction from a joint tort-feasor discharges co-wrong doers; Vide supra, (E) 1.

In an action of trover against the defendant, it appeared that the plaintiffs, prior to the commencement of the present suit, had sued out a writ in a joint action against B. and M. and the defendant, which he discontinued, upon receiving from B. and M. a certain sum of money in satisfaction, and subsequently brought this action against the defendant for the same cause. The jury found a verdict for the plaintiff; and, upon a motion being made on other grounds for leave to enter a nonsuit, the Court observed that it would be a question whether the discharge made to one tort-feasor would not operate as a release to all, for if it were otherwise the plaintiff might get paid by each defendant to the whole amount of the injury sustained. Rule absolute to enter nonsuit.

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One contract not under seal can not be extinguished by another similar contract.

(G) OF SUBSTITUTING ONE SECURITY FOR ANOTHER.

1. BROWN v. WADE, M. T. 1670, K. B. 2 Keb. 851. S. P. STORY v. ATKINS, 2 Ld. Raym. 1430. SCOTT v. SURMAN, Willes, 406. TAYLOR v. WASTENEYS, 2 Str. 1218. MILWARD v. INGRAHAM, T. T. 1674, 2 Mod. 43; S. C. 1 Mod. 205, 1 Freem. 195.

In *indebitatus assumpsit*, defendant pleaded an accord to pay 10*l.* and de-

* The mere fulfilment of an act, which a party is bound in law to do, is no satisfaction. *Per Grease, J.* in *Edgcombe v. Rodd, 5 East, 302.*

† In *Ghrimes v. Blaisfield, Cro. Eliz. 641.* recognised in *5 East, 300.* and in *1 Com. Dig. Abatement, A.* it was determined to be no plea if the satisfaction accrues from a stranger, as if an obligee plead that A. surrendered a copyhold to the plaintiff, which he accepted in satisfaction.

‡ That accord and satisfaction to one of several co-plaintiffs will operate as a discharge to all, *see 12 E. 4. 6; 35 H. 6. 68. a. b; 6 H. 7; 26 H. 6; Fitz. Barn. 37; 5 Co. 117. b; 9 Co. 79. b; and vide tit. Release.*

liver a certain quantity of silk stockings; that the money had been paid, and that he was ready to deliver the latter, and that the plaintiff accepted the defendant's promise in satisfaction. Upon demurrer, the Court held the plea to be bad; not only because it is not executed, but because there is only an action given, and that is no satisfaction, any more than one bond against another. Judgment for the plaintiff.

2 COMBER v. WANE, T. T. 1718, K. B. 1 Stra. 426.

To an action of *indebitatus assumpsit* for 15*l.* the defendant pleaded that he gave the plaintiff a promissory note for 5*l.* in satisfaction, and that the plaintiff received in satisfaction. The plaintiff put in an immaterial replication, to which the defendant demurred; after judgment for the plaintiff in the Common Pleas, it was objected, on error in the King's Bench, that the plea was ill, it being obvious that the note for 5*l.* could not be a satisfaction for 15*l.* *Per Cur.* We are all of opinion that the plea is not good, as the plaintiff had a good cause of action; it can only be extinguished by a satisfaction which he agrees to accept, and it is not his agreement alone that is sufficient, but it must appear to the Court to be a reasonable satisfaction. If 5*l.* he (as is admitted) no satisfaction for 15*l.* why is a simple contract to pay 5*l.* a satisfaction for another simple contract of three times the value? In the case of a bond, another bond has never been allowed to be pleaded in satisfaction, without bettering the plaintiff's case, as by shortening the time of payment. Judgment affirmed. See 2 Keb. 804; Hob. 68; 2 Keb. 851; 1 Mod. 225; 1 Leon. 19; 4 Mod. 43; 1 Mod. 261; Raym. 450; 1 Roll. Ab. 122; 2 Brownl. 47, 71; 1 Aik. 12; 2 Stra. 788; and Lord Ellenborough's observations on *Combes v. Wane*, in *Fitch v. Sutton*, 5 East, 232.

3. LOBLY v. GILDART, M. T. 1680, C. P. 8 Lev. 55, 56.

In debt against an executor upon a bond executed by the testator, 23d March, defendant pleaded an accord made on the 30th April, whereby it was agreed that the defendant should give the plaintiff a new security for the debt, and for another due to him on another obligation, and that he being the executor of the obligor, and the person with whom the accord was made, gave the security according to the agreement, by a bill sealed by himself. Upon demurrer judgment was given, *per tot. Cur.* for the plaintiff, for one bond given in security for another is no discharge, whether founded upon an accord or not, and the accord cannot mend the matter, and yet here the new bond binds him *de bonis propriis*, whereas by the first bond he was bound only *de bonis testatoris*. See *Cro. Eliz.* 716; Hob. 68-9; *Cro. Car.* 85; same point admitted in *Pennell's case*, 5 Rep. 117.

4. KEARSLAKE v. MORGAN, H. T. 1794, K. B. 5 T. R. 512.

Assumpsit for goods sold and delivered, and for money lent; the defendant pleaded the general issue, and that as to 4*l.* 14*s.* 6*d.* one W. P. made his promissory note for 10*l.* payable to the defendant, or his order, at a time which had elapsed before the commencement of the suit, and that the defendant, before the note became due, endorsed it to the plaintiff, for and on account of the said sum of 4*l.* 14*s.* 6*d.* and of the sum of 5*l.* 5*s.* 6*d.* paid by the plaintiff to the defendant, and that the defendant accepted the note, for and on account of those sums; to this plea there was a general demurrer; and it was urged, that the plea ought to have alleged that the note was received in satisfaction of the debt; but the Court, on argument, held the plea good, and advised the plaintiff to withdraw his demurrer, and reply, which he accordingly did. See *And.* 187; 2 Wils. 353; 2 Ld. Raym. 928; 2 B. & P. 518; 6 T. R. 139; 7 id. 64; 3 M. & S. 362; 4 Esp. 46; 3 Taunt. 130; 5 M. & S. 62; 1 D. & R. 359.

* As soon, however, as the bill or note is dishonoured, the liability of the defendant to be sued on the original considerations revives, see 6 Mod. 147; 2 Ld. Raym. 928; 2 Show. 206, *And.* 187; 2 B. & P. 518; 6 T. R. 52, 139, 142. *Sid.* 451; 8 M. & S. 362; 8 East, 147; 4 Campb. 257; 2 Campb. 515; 1 Madd. Ch. 89; *ex parte Blackborne*, 10 Ves. 204. b. In the last-mentioned case the Lord Chancellor said, I take it now to be clearly settled, that if there is an antecedent debt, and a bill is taken without taking an indorsement, which bill turns out to be bad, the demand for the antecedent debt may be resorted to. It has

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And this rule obtains even against pre-judgment process.

5. THE KING v. DAWSON, E. T. 1810, Exch. Wightw. 32.

It was pleaded to an inquisition founded on an extent in aid, that the defendant had accepted a bill drawn upon him by I. C. (the original debtor) and which did not become due until after the inquisition was taken; the replication stated; that bill was dishonoured, and that the original debtor to the crown had been obliged to take it up. Upon demurrer, that as the inquisition was executed before the bill became due, the bill could not at that time have been taken up by the said I. C. the Court held, that as on the day of taking the inquisition no action could have been maintained by I. C. against the defendant upon this bill of exchange, the interest in the bill at that time being in his indorsee, there was, in fact, at that time, no right of action against any person.

6 DRAKE v. MITCHELL AND OTHERS, M. T. 1803. B. K. 3 East, 251.

The giving of another security, which in itself would not operate as an extinguishment of the original one, cannot operate as such by being pursued to judgment, unless it produce the fruits of a judgment.

Declaration against the defendants on a covenant to pay the plaintiff, and his executors, &c. the sum of 917*l.* 10*s.* 9*d.* for the purchase of certain coal mines, to be paid by six several instalments, of 162*l.* 18*s.* 5 1-2*d.* each; breach, that the defendants had not paid the second instalment on the day appointed. Plea, as to part of the money, that the defendant had paid part to plaintiff; and as to the residue, they pleaded, that for the payment, and in satisfaction thereof, the said I. M. (one of the defendants) had made his promissory note in writing, and had delivered the said promissory note to the plaintiff; and that the said I. M. became liable to pay to the said I. M. the sum in the said note specified; and that the plaintiff had afterwards sued the defendant I. M. in the Court of King's Bench, and by the condemnation of the Court had obtained judgment against the said I. M. and that it still remained in full force and effect.

The plaintiff, in his replication, took issue on the allegation of part payment, and demurred generally to the residue of the plea, which, after argument, was overruled, the Court being clearly of opinion, that a judgment recovered in any form of action is still but a security for the original cause of action, until it be made productive of satisfaction to the party, and, therefore, till then it could not be considered as effecting any diminution in the plaintiff's right to make available any other collateral concurrent remedy within his power; that the note when first given was no satisfaction; and the judgment recovered on the instrument is in itself no satisfaction until payment be obtained upon it, and that therefore the plaintiff was entitled to his original remedy on the covenant. Judgment for plaintiff. See Dy. 216. pl. 132; Lil. Rep. 17; 6 Co. 44. b. 45. b. 46, a; Hob. 59; Cro. Jac. 74; Cro. Eliz. 240; Lutw. 878; 2 Show. 494; 3 Mod. 87; 2 Ld. Raym. 1072; 1 Salk. 322; 2 Ves. & Beames, 306; 4 T. R. 825; 2 N. R. 474, 416; 2 Rosc. 79.

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II. WHEN PLEADABLE IN PARTICULAR ACTIONS.

(A) IN ASSUMPSIT.

An accord with meta- al promises to perform, is good in assumpsit though the thing be not performed at the time of action, for the party has a remedy to compel the performance,

1. CASE v. BARBER, T. T. 1680, K. B. T. Jones, 158; S. C. Raym. 450.

In assumpsit for goods sold and delivered, the defendant pleaded an agreement made subsequent to the sale and delivery, between the plaintiff and defendant and the son of the latter, that the plaintiff should deliver cloths to the defendant, and that the plaintiff should accept the son as surety or paymaster for 9*l.* to the plaintiff, in satisfaction of his demand. The delivery of the cloths to the defendant was then averred, and the tender of the 9*l.* by the son, which the defendant had refused to accept. On a general demurrer it was adjudged, that if a reciprocal right of action had been created by the agreement, and the plea had been exempt from other defects, it would have been valid; but as the plaintiff had no remedy against the son for the 9*l.* the contract not been held, that if there is no antecedent debt, and A. carries a bill to B. to be discounted, and B. does not take a name upon the bill, if it is dishonoured there is no demand, for there was no relation between the parties, except that transaction; and the circumstance of not taking the name upon the bill, is evidence of a purchase of it. In a sale of goods, the law implies a contract that those goods shall be paid for. It is competent to the party to agree that the payment shall be by a particular bill. In this instance it would be extremely difficult to persuade a jury, under the direction of a judge, to say, "an agreement to pay by bill was by giving a bill, whether good or bad."

having been averred in the plea to be in writing, according to the provisions of the Statute of Frauds, it was bad.

2. WICKHAM v. TAYLOR, M. T. 1680, K. B. T. Jones, 168.

In assumpsit for the price of goods, the defendant pleaded an agreement to pay 9*l.* and such sum as Mr. L. should tax for cost, in satisfaction of all matters between him and the plaintiff, and alleged mutual promises to perform the bond, with an allegation of the costs having been taxed, and notice thereof and tender of 9*l.* and the costs. The plaintiff demurred generally, and resolved.

Per Cur. If a right of action be not given upon the mutual promises at the time of the arrangement, such assumpsit is no bar to the prior action—and judgment for the plaintiff. Vide supra, Case v. Barber. See Allen v. Harris, 1 Ld. Raym. 122; 1 Com. Dig. Abatement, D.

3. MILWARD v. INGRAM, T. T. 1676, C. P. 2. Mod. 44; S. C. 1 Mod. 205; 1 Freem. 195.

Indebitatus assumpsit for fifty pounds, with *quantum meruit*. The defendant pleaded, that after the promise, and before the commencement of the suit, the plaintiff and defendant came to an account concerning divers sums of money; and that he was found in arrear to the plaintiff thirty shillings; whereupon in consideration of the defendant promising to pay him the thirty shillings, the plaintiff promised to release and acquit the defendant of all demands. Demurrer to plea. On behalf of the plaintiff it was submitted, that though in some cases one promise might be discharged by another, yet where the demand is certain and specific, it could not; and as the plea in this case was in the nature of an accord, which could not be good without an averment of satisfaction, it ought not to be allowed, Bro. Accompt. 46. 48. On the other side it was admitted, that where a matter is pleaded by way of accord, it must be averred to be executed in every respect; yet that the rule did not apply to the case under discussion; for the defendant having pleaded that he and the plaintiff had accounted together, the original contract was destroyed by the account; that the defendant had been discharged from fulfilling the contract by parol, and that fact had been admitted by the demurrer; and that it could not be denied but that a parol discharge of an assumpsit was good.

Per Cur. It has been always admitted, that if there be an assumpsit to do a particular act, and no breach of the promise has been committed, it may be discharged by parol; but if it be once broken, then it cannot be discharged without release in writing. In this case there are two demands in the declaration, to which the defendant has pleaded an account stated; the plaintiff, therefore, can never after have recourse to the first contract, which is merged in the account. If A. sell his horse to B. for ten pounds, and there being divers other dealings between them, they come to an account upon the whole, and B. is found in arrear five pounds, A. must bring an action on the *instimul compulsasset*, for he can never recover upon an *indebitatus assumpsit*.

See post, tit. Account Stated.

(B) IN DEBT.

1. NEALE v. SHEFFIELD, M. T. 1688, K. B. Yelv. 192.

Debt on bond. The defendant pleaded, that after the making the bond and before it came payable, the plaintiff was indebted to the defendant in a load of lime to be delivered upon request; and it was agreed between them, that if defendant would discharge the plaintiff of the load of lime, that, in consideration thereof, the plaintiff would discharge the defendant of the bond, and would accept the lime in satisfaction of the bond, and alleged in fact that he did discharge the plaintiff of the lime, which the plaintiff accepted in charge of the obligation, and then acquitted the defendant of the said obligation, and demanded judgment of the action. But on a demurrer there was judgment for the plaintiff, because the defendant had pleaded in discharge of the obligation, when he ought to have pleaded in discharge of the sum contained in the condition; for it is not a debt simply by the obligation, but the breach of the condition creates the debt; so that if the condition is not dis-

charged, the obligation remains in force, and the matter of the defence is not pleaded in discharge of the condition, but of the obligation, and the plea is therefore bad.

2. PRESTON v. CHRISTMAS, M. T. 1758, C. P. 2 Wils. 36.

To an action of debt upon a bond, the defendant pleaded accord and satisfaction, viz. that he released to the plaintiff all his equity of redemption of certain tenements in satisfaction of all bonds wherein he was bound; and upon demurrer judgment was given for the plaintiff, because this being debt upon an obligation, under seal, without any condition being stated upon the record, satisfaction must be pleaded to be by deed; for whenever a debt is created by deed it cannot be discharged but by a matter of as high a nature, and not by an accord or matter in pais.

See Dal. 105; 1 Rol. Ab. 128. c. 50; 2 Rol. 96.

3. THE KING v. ELLIS, E. T. 1814, Ex. 1 Price, 22.

To *scire facias* on a bond given to the crown conditioned for the payment of certain excise duties, defendant pleaded payment after the day, but before the suing out of the writ, and that the crown had accepted the money in full discharge of the obligation. Demurrer, and joinder in demurrer.

Per Cur. This plea cannot be supported, for it is perfectly clear from the nature of the condition, that if the duties were not paid within the year the bond was to become single, and therefore the subsequent payment of the duties, after the expiration of the year, could be no satisfactory answer to the claim created by the forfeiture of the obligation. The defendant should have pleaded a release. See 4 Ann, Blake's case, 6 Co. Rep. 43. Attorney-General v. Algood, Parker, 5; Lord Berkley's case, Plowd. 236. 237; Bartlett's case, Parker, 277; 43 Geo. 3. c. 132; Noyes v. Hopgood, Cro. Jac. 649.

(C) IN COVENANT.

1. SNOW v. FRANKLIN, T. T. 1699, C. P. 1 Lutw. 358.

In covenant upon indenture between the plaintiff and defendant, the defendant pleaded in bar accord and satisfaction of the covenant before any breach after breach had been committed. On demurrer, exception was taken to the plea that the accord was pleaded to be in satisfaction of covenants, which the defendant in his plea admits were not broken at the time of the accord, and that the plea could not be supported, the covenants, being created by deed, could not be discharged but by deed; but it was conceded that accord with satisfaction would be a good plea in satisfaction and discharge of damages upon covenant broken. Judgment for plaintiff. Overruling Rabbet v. Stokes, 2 Roll. Rep. 187; and see Yel. 125; Blake's case, 6 Rep. 436. S. C. Cro. Jac. 99. by the name of Alvin v. Blaque; and 1 Lutw. 57.

2. WYVIL v. STAPLETON, M. T. 1724, K. B. 1 Stra. 615, S. C. 8 Mod. 292.

On a writ of error on a judgment in C. P. in debt wherein the plaintiff had declared that by a writing under seal between him and the defendant it was agreed that the plaintiff on payment or tender of a certain sum of money by defendant on or before the day of shutting up of the books should transfer to him 200l. in South Sea Stock, and in consideration thereof the defendant agreed that he would on or before the shutting of the said books accept such stock, and would at that time pay for the same, with a proviso to enable the plaintiff to sell out such stock, if the defendant did not accept it; the plaintiff averred that he was at the South Sea House on the day of shutting the books, and offered to transfer such stock, but defendant never appeared, on which he sold the same, and brought his action for the deficiency. The defendant

* But although one bond cannot be pleaded in satisfaction of another, yet payment of a less sum before the day in full satisfaction, and acceptance thereof in full satisfaction, may be pleaded in bar to debt on bond, because parcel of the debt before the day may be mere beneficial to the obligee than the whole at the day, and the value of the satisfaction is not material. Extreme care, however, should be observed in pleading the payment of part, that it be made apparent on the face of the plea, that the part paid was given and accepted in full satisfaction: for if the payment of part be only stated generally, the plea will be bad. See Cro. Eliz. 716; Heb. 68. 69; Cro. Car. 85; Pinnel's case, 5 Rep. 117. a.

pleaded a feoffment in satisfaction; but on demurrer, the plea was unanimously holden to be bad. See 1 Com. Dig. Accord, A, 2; 6 Vin. 438; 10 Vin. 5.

3. *ROGERS v. PAYNE*, E. T. 1768, C. P. Cited 1 Selw, N. P. 510; S. C. shortly reported in 2 Wils. 376.

The plaintiff being seised in fee of a messuage and lands, one parcel of which, consisting of about one-third, lay contiguous to the lands of one E. P. in consideration of a sum of money and the covenant hereinafter mentioned, by indenture released the said parcel of land to E. P. in fee, who thereupon covenanted for herself and her assigns, that she would from time to time, and at all times thereafter, pay one third part of all the taxes and assessments that should be imposed on the said messuage and land. The parcel of land came to the defendant by assignment, who neglected to pay one-third part of the taxes for several years. The plaintiff having declared for a breach of covenant, in the years 1759, 1760, 1, 2, 3, 4, 5, and 6, the defendant pleaded that in Michaelmas Term, 1766, he commenced an action against the plaintiff and one R. J. for certain trespasses committed by them upon the lands and goods of the defendant; and thereupon afterwards, to wit, on the 22d January, 1767, it was agreed (not saying by deed) that the defendant should put an end to his suit, and that plaintiff and R. J. should pay a certain sum of money and costs, and that the plaintiff should relinquish all damages and demands which he then had against the defendant; the plea then averred, that the defendant did not further prosecute his suit against the plaintiff and R. J. and prayed judgment of the action. On general demurrer to this plea it was objected that a covenant to pay money which was by deed could not be discharged without deed; and of this opinion was the Court, and gave judgment for the plaintiff.

Blake's case, 6 Rep. 44, a.

4. *DRAKE v. MITCHELL, AND OTHERS*, H. T. 1803, K. B. 3 East, 251.

In this case it appeared that the defendants had covenanted, in consideration of certain leases granted by the plaintiff to them, to pay the plaintiff a certain sum by instalments. On an action being brought for the recovery of one of the instalments, the defendants pleaded part payment; and as to the residue, that one of the defendants had given his promissory note for the payment and in satisfaction thereof; the plea then set out that a verdict had been since obtained on the note. Replication, taking issue on the part payment, and a general demurrer as to the payment of the residue by the note.

Per Cur. It should have been averred in the defendant's plea that the note was accepted in satisfaction, or that it had in fact produced satisfaction; neither of these facts are set forth, and it is clear, that a judgment recovered on the note is only a security for the original cause of action, until it be made productive to the party. Judgment for the plaintiff. See 2 Tidd, 1008; Macdonald v. Bovington, 4 T. R. 825; Branthwait v. Cornwallis, cited and approved of in Higgins' case, 6 Co. 44, b. 45, b. 46, a; Bassett v. Wood, Litt. Rep. 19; 6 Co. 46, a, Ashbrooke v. Snape, Cro. Eliz. 240; Pudsey's case, cited in Hooper's case, 2 Leon, 110; Pyers v. Turner, Cro. Eliz. 283; Parker v. Amys, 1 Lev. 261; Brown v. Wootton, Cro. Jac. 73; and Yelv. 67.

5. *KAYE v. WAGHORN*, H. T. 1809, C. P. 1 Taunt, 428.

Declaration for breach of covenant. Defendant pleaded in bar, that before any violation of the covenant it was agreed between the parties that the defendant should execute a bond in a penal sum, and that the plaintiff should accept the same in lieu and satisfaction of the covenant, and that defendant had accordingly executed such bond; and that the same had been accepted by the plaintiff, special demurrer to plea, assigning for cause that the accord and satisfaction was alleged to have taken place before breach of the covenant, and that it did not give the plaintiff a better or more summary remedy for any damage he might sustain than he had antecedent to the accord. The Court were clearly of opinion that the plea was untenable, and that any argument on it was unnecessary. Vide supra, p. 130, C. 1.

6. *CORDWENT v. HUNT*, M. T. 1818, C. P. 8 Taunt, 596; S. C. 2 B. Moore, 660.

The plaintiff as a tenant of a farm covenanted with the defendant as landlord

A covenant for the payment of money can only be discharged by deed.

An action on a covenant for the payment of money lies, notwithstanding a note has been given after the day of payment and satisfaction of the debt, and on which judgment has been obtained, unless it appears that it was either accepted in satisfaction or has actually produced it.

[132] The delivery of a bond in satisfaction before breach is no bar to an action on a covenant.

by the plaintiff to the defendant to refrain from completing his covenant is not pleadable as an accord.

to fetch and bring all timber, stone, and other materials, as should at any time during the continuance of the term be wanted about the erecting of a threshing-mill, and the latter covenanted to build and erect the same. The defendant pleaded, first, that with all necessary and convenient speed after the making of the indenture, and during the continuance of the term thereby granted, to wit, on, &c. he began to find and provide the necessary materials for building and erecting the mill according to the effect of his covenant in that behalf, and that afterwards, and whilst he was finding and providing such materials, and before a reasonable time from the making of the indenture for commencing the actual building and erecting of the mill, had elapsed, the plaintiff requested the defendant not to build or erect the said mill, but to refrain from so doing, and neglect and omit so to do, until he the defendant should be thereunto afterwards, and during the continuance of the term, requested by the plaintiff; and that the defendant in pursuance of that request, and in consequence of the plaintiff's never having thereafter, nor before the determination of the term, requested the defendant to build the mill, he did, from the time of making the said request, until the determination of the term, neglect to build the same or cause such mill to be built; and, lastly, that the defendant committed the said supposed breach of covenant by the leave and licence of the plaintiff for that purpose given and granted. Demurrer to these pleas, assigning for cause that it did not appear from the first plea that the covenant had been released or discharged by any instrument under seal, and that the parol request was indefinite, uncertain, &c.; and, secondly, that the last plea alleged a leave and licence which did not appear to have been granted by deed, and that it was in other respects informal, &c. Joinder in demurrer. *Per Cur.* The case before the Court must be governed by the decision in *Sellers v. Beckford*, 1 Moore, 460; and *Thompson v. Brown*, 1 Moore, 358. The pleas in their present form neither show a sufficient release, nor do they amount to an accord and satisfaction. The plaintiff is entitled to judgment.

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(D) IN TRESPASS.

Accord and satisfaction is a good plea in bar to an action of trespass; (9 Rep. 78, a;) but as an accord without satisfaction is invalid, it cannot therefore be pleaded, in an action for taking and seising cattle, that it was agreed that "the plaintiff should have his cattle again," for this is no satisfaction for the injury done.

The plea must not only state the acceptance of the goods and chattels, and that he had accepted them in satisfaction, but that it was given in satisfaction;

III. HOW TO BE PLEADED IN GENERAL.

1. *FREDERICK v. GOSFRIGHT*, T. T. 1691, 2 K. B. Carth. 237.

In debt on bond, the defendant pleaded in bar that he gave the plaintiff distance of the vers goods and chattels, and that he had accepted them in satisfaction, to which the plaintiff demurred. *Per Cur.* The plea is bad, because the defendant has not pleaded that he gave the goods in full satisfaction, but only that the plaintiff accepted them as such. The former allegation is material; it should have been stated that he gave them for that purpose. See *Forms*, 2 Chit. Pl. 467; *Petersdorff's Index*, 4.

2. *HILLMAN v. UNCLES*, M. T. 1692, K. B. Skin. 391. *S. P. BREE v.*

SAYLOR, H. T. 1665, K. B. 2 Keb. 322.

And a perfect performance of the terms of the accord must be shown.

In trespass, the defendant pleaded that the trespass was committed by him and J. R. and that after it was committed it was agreed between the plaintiff and the said J. R. that J. R. should abate 14s. due to J. R. from the father of the plaintiff, in satisfaction of the trespass, and averred that J. R. had abated the said 14s. Demurrer to plea. *Per Cur.* This plea is bad. It ought to have been shown how J. R. had abated the 14s. as by stating that the father of the plaintiff owed her so much, and had paid her a certain sum deducting the 14s.; pleading generally that she abated that sum, as has been adopted here, is uncertain and bad.

3. *OUTRAM v. ROLSTON*, T. T. 1692, K. B. 2 Keb. 51. *S. P. BREE v. SAYLOR*, H. T. 1663, 2 Keb. 332.

In covenant, the breach assigned was in not paying 8l. a-year, and not

Hence merely saying that the defendant

purchasing lands worth 100*l*. The defendant pleaded an accord that he had paid part, not saying how much; and that for the rest, the plaintiff was to enter and take the profits of certain lands; and tendered an issue that he had performed and paid. Upon demurrer, it was objected for the plaintiff, that accord is no plea, but the Court held that although an accord is a good plea, to a covenant to pay a certain sum, or an obligation when joined with other things uncertain, yet the present accord not mentioning what part in particular he had paid, was void. [134]

4. *THE VANION V. PENHOLLOW*, E. T. 1665, K. B. Sty. 452.

In an action for words, the defendant pleaded that the plaintiff had agreed to accept three jugs of beer from him in satisfaction. The plaintiff demurred, because he did not show that the same was delivered or tendered by the defendant, and therefore the plaintiff had judgment.

5. *PAINE V. MASTERS*, M. T. 1723, K. B. 1 Stra. 573.

Action of assumpsit upon a promissory note, the defendant pleaded the delivery of twenty hogsheads of claret in satisfaction, and which *ipsi præd*, the defendant (instead of the plaintiff) received in satisfaction. On a general demurrer, it was objected, that the averment of the delivery of the wine to the plaintiff was not sufficient, without showing his acceptance of it, which was wanting in this case in consequence of the defendant's name having been substituted for the plaintiff's. And cited Salk, 629; and the case of *Hawkshaw v. Rawlings*, in B. R. Hil. 3 Geo. in both which the Court held that the bare pleading that the defendant gave the thing in satisfaction, without showing that the plaintiff received and accepted it as such, would be insufficient. *Et Per Cur.* Judgment for the plaintiff.

6. *TIMBER V. GARDINER*, E. T. 1712, K. B. 7 Mod. 224. S. P. *HIGDEN V. HIGDEN*, T. T. 1691, Comb. 199.

Action of assumpsit. Defendant pleaded that he gave the plaintiff a certain quantity of, &c. and the plaintiff accepted it in full satisfaction of the promises. Plaintiff demurred, and defendant joined in demurrer. It was insisted for the plaintiff that the defendant's plea was bad, because it did not allege that the defendant gave it in satisfaction. 5 Co. Rep. 117. *Per Cur.* If the defendant gave it with one intention, and the plaintiff accepted it with another, the intention of the donor must prevail; but the question here is, whether the words (full satisfaction) shall not relate as well to the verb give, as the word accept, especially as the conjunction "and" renders the present case distinguishable from the decision referred to.

7. *WILLIAMS V. FARROW*, M. T. 1782, K. B. 6 Mod. 82.

To an action of debt on bond in London, a feoffment of land in a different county, and that plaintiff had accepted it in satisfaction of the bond, was pleaded in bar. On special demurrer, assigning for cause that the acceptance ought to have been alleged to have taken place in London, it was said,

Per Cur. The acceptance must be laid where the feoffment was made, that, being local, had it been a transitory matter, the defendant's plea should not have made it foreign. See 2 Lev. 166; Carth. 288; 42 Mod. 85; Stra. 1126.

8. *HOPKINSON V. TAHOUDIN AND ANOTHER*, M. T. 1816, K. B. 2 Chit. Rep. 303.

To an action of assumpsit on several promises, the defendant pleaded that the plaintiff accepted in satisfaction of the cause of action, a pipe of wine.

Per Cur. The plea professes to answer the whole declaration; when in fact it only answers part; it cannot therefore be sustained. Judgment for

* According to the present practice, unless a particular place be material to the defence, it does not appear to be necessary to state any place where the facts happened. 1 Saund. 8. n. 2; Vin. Ab. Trial. a. pl. 20; Com. Dig. Pleading, c. 20; Lutw. 1466; Stephen on Pleading, 298. 300. The rules applicable to the subject were luminously and correctly expounded by Lord Chief Justice Eyre, in *Ilderton v. Ilderton*. 2 H. Bl. 161; who there stated that as defendants with respect to transitory matters are obliged to lay the venue in their pleas, in the place laid in the declaration, and since the statute 4 Ann. c. 16. § 6. has directed that the jury shall come *de corpore comitatus*, the law of venue will be found to be very subsequently altered, and to lie in a narrow compass; and the distinction between laying no venue at all in a plea, and being obliged to lay the same venue as in the

had paid part of the sum agreed to be accepted in satisfaction is laid.

The delivery of the chattel in satisfaction must be distinctly stated in the plea;

And that it was accepted as such.

Semb. Alleging that defendant gave the plaintiff a certain

quantity of &c. and the plaintiff accepted in full satisfaction, is sufficient.

Where a feoffment is pleaded in satisfaction of a bond, the acceptance must be laid in the county where the feoffment was made.

Sed quæ?

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A plea of accord and satisfaction professing to answer the whole declaration, but in fact containing

an answer plaintiff. See Willes, 55, 480; 1 Saund. 28. n. 1, 29, b. n. 1; 1 H. Bl. 645; 1 B. & P. 411; 6 Taunt. 606; Stra. 303; 1 Chit. Pl. 511.

but to part 9. FRANCIS V. CRYSELL, T. T. 1822, K. B. 5 B. & A, 886; S. C. 1 D. & R. 546.

The defend ant cannot plead to an action of *assumpsit* payment of the debt 'in discharge of the prom ises and un der takings' without al so stating that it was accepted in discharge of the dam ages.

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To an action of *assumpsit* for the recovery of 19l. the defendant pleaded, that after the making of the promises, and before the exhibiting of the plaintiff's bill, the defendant paid the plaintiff 19l. in discharge and satisfaction of the promises and undertakings, and the plaintiff received the 19l. in satisfaction and discharge of the said promises and undertakings; to which the plaintiff replied a writ, sued out before such payment. Demurrer and joinder. In support of the plea it was argued, that although the word "damages" had not been inserted in the plea, the omission could not be considered as forming a material objection, because, immediately on the payment of the debt, the plaintiff's right of action terminated. *Sed Per Cur.* There is no satisfaction of the plaintiff's damages averred in this plea, and the plea cannot be supported. Satisfaction of the defendant's promises and undertakings is not sufficient; it has always been held necessary to include satisfaction of the plaintiff's damages. The cases which have been cited as instances of a contrary determination, do not govern the present case, because in one and all of them the decision has turned upon a peculiar form of issue, which rendered the addition of the word damages unnecessary. In *Dixon v. Parkes*, 1 Esp. 109, the action was brought upon a bond not bearing interest; consequently when the principal was paid there was no breach, and there were no damages arising to the plaintiff of which the defendant could plead satisfaction. But the case of *Perry v. Odingsell*, 4 Mod. Rep. 250, is an authority in express contradiction to the argument contended for on the part of the present defendant; and upon that authority, and the grounds already stated, the plaintiff is entitled to the judgment of the Court.

10. RICHLEY V. PRONE, H. T. 1823, K. B. 1 B. & C. 286; S. C. 2 D. & R. 661.

Plea of delivery of hemp, &c. in satisfaction to an action for use and occupation, on affidavit of its falsity judgment allowed to be signed as for want of a plea. *Qu. overruled. Vide infra* The Court will not require a defendant to verify his plea of accord and satisfaction, nor call on the attorney to say by whose authority he has put the plea on the record.

In an action for use and occupation, the defendant pleaded that he had delivered to the plaintiff a ton of hemp, and one hundred weight of tallow, in satisfaction. On the production of an affidavit that the plea was in every way false, the Court, without delivering any public opinion, made a rule absolute that the plaintiff should be at liberty to sign judgment. See 10 East, 237; 3 B. & P. 395, 398; 7 East, 333; 2 N. R. 188; 4 Taunt. 668; 3 Taunt. 339; 1 Chit. Rep. 525, n. 565, n.

11. MERRINGTON V. BECKETT, T. T. 1813, K. B. 3 D. & R. 231; S. C. 2 B. & C. 81.

On cause being shown against a rule *nisi* for the plaintiff to sign judgment for want of a plea on an affidavit that the plea was false, it appeared that the declaration was for goods sold and delivered to the defendant, and that the plea was the delivery of other goods to the plaintiff, which he received in full satisfaction of his debt *Per Cur.* In this case, although the defendant is an attorney, he is to be considered like any other suitor of the Court. Now it would break in on many principles of law to oblige a party to verify his plea on oath. At the same time that we endeavour to protect suitors from unnecessary expences and long delays, we must take care that defendants are not prejudiced. To question the truth of a plea, we should be infringing on the province of the jury. We therefore at present do not lay down any general rule, but the practice may be pursued. We will either make a rule of court respecting the practice, or recommend the legislature to interfere. It was held by Lord Holt, in *Pierce v. Blake*, 2 Salk. 515, that the Court could call on the defendant to show by what authority he filed a sham plea, but we think that we cannot safely follow that authority. The old practice must at present remain, and we will think of a remedy for it. Rule discharged without costs.

declaration, will be a difference; and the principle now is, that the place laid in the declaration draws to it the trial of every thing that is transitory; and it should seem that neither forms of pleading, nor ancient rules of pleading established on a different principle, ought now to prevail.

IV. REPLICATIONS TO IN GENERAL.

1. *YOUNG v. RUDD*. M. T. 1695. K. B. 5 Mod. 86; Comb. 340. S. C. 2 Salk. 627; S. C. Carth. 347; S. C. 12 Mod. 85; 1 Lord Raym. 60. S. C.

To an action of *indebitatus assumpsit*, the defendant pleaded in bar that he gave the plaintiff a beaver hat, which the latter accepted in discharge of the debt; the plaintiff in his replication protested that the defendant did not give the hat in satisfaction, and traversed the acceptance. On demurrer to the plea, it was contended that the traverse was immaterial; for the giving is the essential matter which ought to have been traversed, and not answered by protestation. On the other side it was argued, that either the delivery or acceptance in satisfaction might be traversed, at the election of the plaintiff.

Per Cur. Where matter is pleaded by way of accord, it is issuable; but if the accord be not executed by giving and receiving, it cannot be pleaded in bar to the action. Both allegations are traversable. In this case the denial of the acceptance implies that the thing given was not as satisfaction. See *Pinnel's case*, 5 Co. 117; Moor. 677; Style, 263; Cro. Eliz. 68; 2 Brownl. 1071; 2 T. R. 24; 1 Com. Dig. Accord, E.; Precedents, Petersdorff's Index, 5.

The replication may protest against the delivery of the chattel in satisfaction, and deny the acceptance;

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2. *TAYLOR v. BAKER*. M. T. 1694. K. B. 5 Mod. 136.

Quantum meruit for work and labour, and an account stated for 5*l*. The defendant pleaded, that it was agreed between him and the plaintiff, that the defendant should give, and the plaintiff should accept a bill of 5*l*. in satisfaction of what was due to him, and that he did accept such a bill according to the agreement. The plaintiff replied, *protestando*, that he made no such agreement; *protestando etiam*, that there was no such bill given: *pro placito dicit*, that it was under seal. And upon demurrer to the replication, it was held good.

Or negative the agreement to accept;

3. *HAWKSHAW v. RAWLINGS*. H. T. 1716. K. B. 1 Stra. 23.

Debt on bond; the defendant, after oyer, by which it appeared that he and two other obligors joined to pay money at a future day, pleaded payment at the day by the other two obligors, and an acceptance by the plaintiff in satisfaction; the plaintiff protesting that the two other obligors did not pay, replied that he did not receive in satisfaction *modo et forma*, and upon this issue a verdict was found for the plaintiff. It was moved that a replender might be awarded, for that this is an immaterial issue, the payment, and not the receipt, being proper to be put in issue; and that the action against the defendant was *quantum* upon a single bond, and then the payment will be only equivalent to a payment by a stranger. But the Court said that although payment by a stranger be not a legal discharge, yet acceptance in satisfaction is. There are two requisites to work a discharge, 1st. payment, 2d. acceptance, and a traverse of the acceptance is an argumentative denial of payment. There can be no payment in satisfaction without an acceptance in satisfaction; and if the plaintiff says that he did not accept in satisfaction, the consequence is, that it was not paid in satisfaction; the judgment was given for the plaintiff.

Or allege that he did not accept in satisfaction *modo et forma*;

V. WHEN EVIDENCE UNDER THE GENERAL ISSUE.

1. *PARAMOUR v. JOHNSON*. E. T. K. B. 12 Mod. 376; S. C. 1 Lord Raym. 266; S. P. admitted, *FITCH v. SUTTON*. T. T. 1814. 5 East, 230. *MARTIN v. THEATON*. E. T. 1802. 4 Esp. 180. *HUXHAM v. SMITH*. H. T. 1809. 2 Campb. 19.

Per Holt, C. J. It is an indulgence to give an accord with satisfaction in evidence under the plea of *non assumpsit*, but the practice is crept in and now is settled. See 1 Chit. pl. 472; 1 Phil. Ev. 131; 1 Selw. N. P. 119.

2. *LYNE v. APPELGATE*. M. T. 1815. 1 Stark. 97.

Declaration for words; plea, the general issue. It was proved that an agreement had been entered into on the part of the plaintiff that he would waive his action for defamation in consideration of the defendant destroying certain documents in his possession, or which might afterwards come into his possession.

Accord and satisfaction may be given as evidence in *assumpsit* under the general issue. [138] Or in an action on the case;

sion; and that the defendant in pursuance of this agreement, had destroyed some of them. Per Lord Ellenborough. This is a good defence to the action, and admissible under the general issue. See 3 Burr. 753; S. C. 1 Bl. Rep. 388; 1 Wils. 45; 2 Saund. 155. a. n. 4; 2 Vsn. Abr. 11 pl. 27; Sid. 45. 3. Doe, *DEM HILL v. LOE*. T. T. 1812. 4 Taunt. 459.

But not in trespass.*

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An action of account must be brought where money

has been delivered to a party for a particular purpose, and he has laid out part of it; but if none were laid out an *indebitatus assumpsit* lies to recover it back, or if it were expended to another purpose the latter remedy may be adopted; But an action of account is necessary where money is delivered to a defendant generally to make purchases of merchandise for the benefit of the plaintiff. There is a distinction between a delivery of money, &c. upon an express promise to account, and a delivery generally; on the former as *assumpsit* lies, in the latter account only.

Action for mesne profits; plea, general issue. At the trial evidence was offered of an agreement between the parties to waive the costs of the action of ejectment, and that the plaintiff had accepted rent of the defendant subsequently to that arrangement having been entered into; but evidence of these facts were holden inadmissible by the judge at the trial, and the court afterwards approved its rejection. See 7 Burr. 1353; 2 Wils. 173; 1 Stra. 61.

Account, Action of.†—See tit. Account stated; Bailment; Guarantee; Money had and received; Principal and Agent.

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I. IN WHAT CASES IT IS OR IS NOT MAINTAINABLE.

1. HARTAP *v.* WARDLOVE. E. T. 1682. K. B. 2. Show. 301.

An action of *indebitatus assumpsit* does not lie against a man where he has received money from the plaintiff to lay out to a particular use, and he has laid out part accordingly, for then he ought to be called to account for the same by action of account; but if none were laid out, then an *indebitatus assumpsit* lies to recover back the money; so if it were expended to another purpose, for there the sum is certain, and may be demanded as a debt. See Hob. 209; Cro. Eliz. 644; 1 Rol. Rep. 259; Owen, 86; 1 Holt. N. P. C. 500. *Post*, tit. Money had and received.

2. ANONYMOUS. T. T. 1795. K. B. 11 Mod. 92.

Per Holt, C. J. Where money is delivered to a party not in payment of debt, but *ad computandum* or *merchandizandum*, the remedy must be an action of account; in which the defendant shall have the benefit of an account-ant.

3. SPURRAWAY *v.* ROGERS. E. T. 1700. K. B. 15 Mod. 517.

Holt, C. J. If A. take goods from B. to account for them if they come to account, though A. gives no true account, yet if B. has agreed to it, it is well. And if one receive goods of another, and expressly promise to be accountable for them, or to give an account of them, case will lie if he will not account upon that promise; but upon a general bailment of goods without a particular promise to account, then the sole remedy is by account. And if one covenant or promise specially upon receipt of goods to be accountable for them, if he will not account, action upon the covenant or promise will lie, and an action of account lies upon the general receipt.

* 1 Phil. Ev. 134; 2 Selw. N. P. 1270. Or in an action of debt on a speciality, Rep. 119; Com. Dig. tit. Pleader; 2 W. 18; but under the plea of *nil debet* it would be admissible in evidence. See 12 Mod. 376.

† The proceedings in an action of account being intricate, dilatory, and expensive, it is now almost obsolete, especially as a preference is given to the modern and more effective practice either of supporting an action for money had and received; or if the matter be of a complicated nature, by proceeding in a court of equity, where the plaintiff can obtain a discovery of books and papers, and have the benefit of the defendant's oath, who on the other hand is entitled to all, both legal and equitable allowances. See Eq. Ca. Ab. 5; Thompson *v.* Lambe, 7 Ves. 588.

4. *ANON.* T. T. C. B. 11 Mod. 92. S. P. *KEY v. GORDON*, E. T. C. 1700, K. B. 12 Mod. 521. But on misapplication of money received for a particular service,

If money be given to another to buy goods, and he neglects to purchase them, for this breach of trust the plaintiff has an election to bring either debt or account. *Per Powell, J.*

5. *POULTER v. CORNWALL*, M. T. 1705-6, K. B. 1 Salk. 9. S. P. *KEY v. GORDON*, E. T. C. 1700, 12 Mod. 521. Or on refusal to account, the debt is absolute; and debt or indebitatus assumpsit lies, and after verdict these facts will be presumed.

Indebitatus assumpsit for money received *ad computandum*. Verdict for plaintiff. It was moved in arrest of judgment that this action did not lie, as the appropriate remedy was an action of account. *Per Cur.* The verdict has aided the declaration; for it must be intended there was proof to the jury that the defendant refused to account, or had done some other act that rendered him an absolute debtor. See *Hob. 209*; 1 *Rol. Rep. 259*; *Cro. Eliz. 644*; *Owen, 86*.

6. *ANONYMOUS*, E. T. 1700, K. B. 12. Mod. 509.

In account it appeared in evidence that A. gave a note on C. to B. to receive the money for the use of A.; B. being indebted to C., C. accepts his own note from B. in discharge of B.'s debt; held that account was the proper form of action. An action of account lies to recover money received by the defendant to the plaintiff's use. Where there is an express promise the plaintiff has an election to bring either account or assumpsit.

7. *WILKIN v. WILKIN*, H. T. 1689, K. B. 1 Salk. 9; S. C. *Carth. 89*.

In *assumpsit*, the plaintiff declared that the defendant having proposed to go abroad, he delivered to him a box and goods, which the defendant promised to dispose of for him, and to give him an account thereof on his return. Plea in abatement, that he was the plaintiff's bailiff, and had merchandised the goods; and that the plaintiff ought to have an action of account, and not an action on the case. *Per Cur.* This plea cannot be supported; for the present action being founded on an express promise, *assumpsit* lies as well as account, and the plaintiff had his election to adopt either of the two remedies. Judgment for the plaintiff. In the report of this case *Carth. 89*, it is said that Lord C. J. Holt declared he would not let the plaintiff give all the account in evidence, or enter into the particulars thereof, but that he should direct his proof only as to the damages he had sustained by not accounting according to the promise, for he would not ravel into an account in such actions.

8. *SCOTT v. M'INTOSH*, T. T. 1808, 2 Camb. 238. S. P. *LINCOLN v. PARR*, 1760, K. B. 2 Keb. 781.

Indebitatus assumpsit for brokerage and commission, with the usual money counts and accounts stated. Plea, non *assumpsit*. It appeared that the action had been brought to recover the balance of a long and complicated running account between the parties, a merchant and broker. *Per Lord Ellenborough*. This is not the proper tribunal for investigating complicated mutual demands. The plaintiff should have brought an action of account, when auditors would have been appointed, who could have done justice to the parties without occasioning any inconvenience to the Court or jury. Plaintiff nonsuited. See *Tri. per Pais, 407*; *Gilb. Law. Ev. 192*; *Farrington v. Lee*, 1 Mod. 269; *Sandos v. Bloodwell*, W. Jones, 401; *Owston v. Ogle*, 13 East, 536. and *supra, 7*. Where there is a running account between merchant and broker the only remedy at law is an action of account.

9. *TEMPKINS AND OTHERS v. WILLSHEAR*, E. T. 1814, C. P. 5 Taunt. 431; 1 Marsh. 115. S. C. *ARNOLD v. WEBB*. Western Spring Assizes, 1814, 5 Taunt. 432, *notis. S. P.*

This was an action to recover the sum of 104*l.* on a balance of accounts. The plaintiffs were bankers, with whom the defendant had kept cash. In 1808 a balance was struck, and from that time till 1811 many sums had been paid in and drawn out without any balance having been adjusted, and it was then found that the defendant was indebted to the plaintiffs in the sum sought to be recovered by the present action. *Per Cur.* An action of account is applicable where the plaintiff wants an account, and cannot give evidence of his right without the aid of the facilities that action affords. But here the plaintiff

* See *Com. Dig. tit. Action upon the case upon Assumpsit, A. 1.* where it is laid down that *assumpsit* lies in every case where account would lie, and refers to 1 Salk. 9.

takes up the balance stated on the account, proceeds with his evidence through many other items, and establishes a balance due. It is therefore impossible to say that an action of assumpsit will not lie for that balance. The case of *Scott v. M'Intosh* (*supra*), which has been cited, was, a case which never could have been tried, and there is a decency in counsel in not pressing such a case to a conclusion.

II. PARTIES TO THE ACTION.

GODFREY v. SAUNDERS, E. T. 1769, 3 Wils. 73.

Joint factors or bailiffs may be sued jointly, though only one be the actual defaulter. *Per Cur.* Joint factors or co-bailiffs are like co-obligors, and are answerable for one another for the whole; for if only the factor who actually embezzles the effects was answerable, it would be the same as if that one were only entrusted; hence a plea before auditors that the defendant was joint bailiff with A. and that, with the consent of the plaintiff, he delivered over to A. all the effects, is bad, because, by making them joint bailiffs, the plaintiff gave such consent originally, and consenting to the transfer is nothing unless the plaintiff had also discharged him of the account. Every consignment to two factors jointly imports a consent by the consignor for them to trust one another, but both are answerable and accountable for the whole, though they have a right by the contract to deliver over to one another.

See *Goore v. Danberry*, 2 Leon. 75, 76; *Waugh v. Carver*, 2 H. B. 235; *Bro. tit. Charge*, pl. 49; *Cowp.* 814, in notis; 7 Taunt. 403; 2 Marsh. 437. See post, tit. Partners.

III. OF THE DECLARATION.

1. BISHOP v. EAGLE, M. T. 1707. K. B. 11 Mod. 186.

A declaration against a receiver, stating that defendant received several sums of money by the hands of the parishioners without stating them particularly is bad. [142] The declaration charged the defendant, as churchwarden, with having received several sums of money from the parishioners without particularly describing them by name. The defendant, in his plea, negatived that he was churchwarden. On a motion in arrest of judgment it was contended that the declaration ought to have disclosed by whose hands the defendant had received the several sums of money, and that the allegation *per manus parochianorum* was too general and unspecific. The Court concurred in this opinion, and the judgment was accordingly arrested.

2. WALKER v. HOLYDAY, M. T. 1704, C. P. 1 Com. Rep. 272.

Where these particulars can not be stated, the defendant should be charged as bailiff. In account by one tenant in common against another as bailiff, and also as receiver of so much profits of the lands held in common, and for so much money by the defendant received to the plaintiff's use, the defendant demurred, it not being alleged from whose hands he received the money. But it was urged that the validity of this exception was taken away by 4 & 5 Anne, c. 16. which gives account to one tenant in common against another; so that it appearing by the declaration that they are tenants in common it is sufficient, without saying by whose hands the profits were received. *Sed non allocatur*; The statute only authorises one tenant in common to charge the other as bailiff. At the common law, account did not lie by one tenant in common against his companion, unless where express authority was given to take his part, and then he was chargeable as bailiff, but now by the statute he may be charged if he receives his companion's share, though without his privity, yet he ought to be charged as bailiff by the express words of the statute, and cannot be charged as a receiver; and therefore, as the declaration charges him as a bailiff, and also as a receiver, it ought to be shown by whose hands, as at common law. Judgment for the defendant. See 21 E. 3 60; 41 E. 3; 1 Rol. Ab. 119; pl. 9; Co. Lit. 172, a; 4 Leon. 39; Cro. Eliz. 83.

3. BURDET v. THRULE, H. T. 1673, K. B. 2 Lev. 126.

But the omission is only a defect in form, and In account by the plaintiff against the defendant, the declaration stated *quod reddat et rationabilem compotem de tempore quo fuit receptor bonorum et merchandizorum ad compotum inde ei reddent*, but contained no allegation as from whose hands the goods had been received. The plaintiff had obtained judgment *quod compuet* by default. The defendant afterwards pleaded an insufficient plea before the auditors, to which the plaintiff demurred, and

obtained judgment. It was moved in arrest of judgment, that as the declaration charged the defendant as receiver, it ought to have been shown by whose hands; and that the defendant ought not to have been described as receiver, but as bailiff, for he was to sell and dispose of the property, and, as incident thereto, to be allowed his expenses and factorage. *Sed per Cur.* The plaintiff is entitled to judgment; for though he ought to have been described as bailiff, yet he should have demurred to the declaration to enable him to take advantage of the defect, and cannot object to it after a judgment *quod compulet*.

4. WHEELER v. HORNE, T. T. 1740, C. P. Wiles, 208.

In an action of account the plaintiff declared that defendant was bailiff to him of one-twelfth part of two messuages and one hundred acres of land, and had received the annual rents and profits to render an account when he should be required. Defendant pleaded that he never was bailiff or receiver to the plaintiff, to render an account in manner and form as the plaintiff had described. At the trial it appeared in evidence that the defendant never was in fact appointed bailiff or receiver, but that plaintiff and defendant were tenants in common of the premises, and that defendant received the rents and profits during the time laid in the declaration. A case was made for the opinion of the Court *Per Cur.* The plaintiff in this case is not entitled to recover; for the defendant never having been duly appointed bailiff, the plaintiff should have charged him specially as tenant in common; the verdict must therefore be set aside. As no action lay between tenant in common, &c. at common law, it must be brought, if at all, upon the statute 4 Anne, c. 16. Now, though the statute gives such an action by one against the other as bailiff, yet it differs much from an action of account at common law, in which a bailiff was liable for what he might have received generally. Whereas a tenant in common, &c. by this act is (4 Anne, c. 16,) made answerable only for what he received more than his just share and proportion; besides, at common law the auditors could not examine upon oath, as they may in the action given by the statute. Now as the judgment is the same in both actions, *quod compulet*, these material differences will be lost, and the auditors not know how to proceed; it ought therefore to appear upon the face of the record; and the constant practice is to set it forth that the parties are tenants in common, &c. and then to declare against defendant as bailiff to the plaintiff according to the statute. Nor can the want of this description of the relative situation of the parties be aided by entering a suggestion; nor would it be proper; for that the use of that is to bring matter upon the record which could not appear upon the pleadings. Verdict set aside with costs. See Co. Lit. 172. a; 4 and 5 Ann. c. 16; 1 Sel. N. P. 3. n.

IV. OF PLEAS IN BAR TO THE ACCOUNT.

1. SOUTHCOOT v. RIDER, M. T. 1651. K. B. T. Raym 57.

In an action of account against the defendant as receiver, he pleaded that the 20*l.* demanded by the plaintiff was delivered to him, to pay over to such persons as A. B. and C. D. should think fit, and that they awarded that he should deliver it over to one H. &c.; *abs. hoc*, that he was his receiver. Verdict for the plaintiff and judgment *quod compulet*. *Per Cur.* The plea is well enough except with regard to the time; for when the plaintiff charges a defendant, as receiver, from such a time to such a time, he must answer the entire time precisely.—Judgment must therefore be given for the plaintiff.

See 1 Rol. Abr. 496. pl. 10; Weeks v. Peach, 1 Salk. 179; Market v. Johnson, 6 Salk. 180; Vincent v. Beston, Ld. Raym. 617; Pein v. Henriques, 5 Ld. Raym. 841; 1 Chit. pl. 611. 3. ed.; Stephens on Pl. 231.

2. TAYLOR AND ANOTHER, Churchwardens of Dowham, v. THEIR PREDECESSORS. T. T. 1669. K. B. 1 Mod. 65; S. C. 2nd Keb. 675. 704; S. C. 1 Vent. 88; S. C. 1 Danv. 223.

This was an action against churchwardens to compel them to account for a bell; they pleaded in bar that the bell was not in their possession, as they

* The declaration may charge the defendant as bailiff and likewise as receiver, F. N. B. 116; 1 Com. Dig. Accompt, A 2.

aided by a judgment *quod compulet*. *Sed per Cur.* A declaration against defendant as receiver upon a receipt, as *merchandisandum* for which he is chargeable as bailiff, is bad on demurrer. In an action of account by one tenant in common against another upon the 4 Ann. c. 16 s. 27, the plaintiff must state in his declaration that he and the defendants were tenants in common and that defendant has received more than his just share. It is not sufficient to charge defendant merely as bailiff.

[143]

When the plaintiff charges the defendant as receiver from such a time to such a time the defendant must answer the whole time precisely.

The defendant may plead any matter in bar which tends to show that

he ought
not to ac-
count.

[144]

The time
for which
a defendant
is charged
in the dec-
laration, as
bailiff, or
receiver, is
not travers-
able.

In account
as receiver
of eighty
pigs of lead
a plea that
he did not
receive
them with
out saying
"or any
part there-
of," is bad.
Stating that
the defend-
ant was not
receiver
from a par-
ticular day
excludes
the day.

The defend-
ant may
plead in
bar that he
never was
receiver.

In account
against a
man, as re-
ceiver by
his own
hands, the
defendant
may wage
his law;
otherwise if
he be charg-
ed as receiv-
er by the
hands of an
other,

[145]
Or be char-
ged as bail-
iff *ad mer-
chandizan-
dum*.

A writ of
account
may be ab-
ated in part,
and judg-
ment *quod
computet*
for the resi-
due.

had delivered it to a bell founder, to be repaired, and that it was still in his hands. Demurrer that the plea was no bar to the action. *Per Cur.* This plea is good, for whenever the matter or cause of the account is taken off, the plea is good in bar. See 10 Mod. 22; 1 Rol. Abr. 118; 1 Stra. 680.

3. *BROWN v. JOHNSON.* H. T. 1675-6. K. B. 2 Mod. 155.

In an action of account, the plaintiff declared, that, from the first of March, 1669, to the 1st of May, 1674, the defendant was his bailiff and receiver. The defendant pleaded in bar, that from the first day of March to the first day of May he was not the plaintiff's bailiff or receiver, *et hoc paratus est verificare*. Demurrer to plea, that the defendant had improperly made the time parcel of the issue, which was merely inserted as a matter of form, and that he ought to have pleaded that he was not bailiff *modo et forma*.

Per Cur. This plea is bad for the reasons assigned in the demurrer; the time should not have been made parcel of the issue. See *Lane v. Alexander*, Yelv. 122; Cro. Jac. 202; 1 Brownl. 140; Ra. Ent. 8. 19. f. pl. 1. fo. 20. pl. 6. f. 22. pl. 2. tit. "Accompt," 30. Id. Raym. 85. 281; 10 Mod. 251; Stra. 21. 181. and ante 143. IV. It was then objected to the plea, that the plaintiff having charged that the defendant as receiver of eighty pigs of lead, the defendant had only pleaded that "he was not receiver thereof," without stating "of any part thereof." The Court admitted the validity of the objection, because he might retain seventy-nine and yet not eighty pigs of the metal; but to plead generally *ne unques receptor* is well enough, though it was urged, that if it had been found against him upon such an issue, that he had received and parcel of the lead he would be obliged to account.

See 24 Ren. 4. pl. 11; 32 Hen. 6. pl. 33; 2 Rol. 3. 14; Fitz. "Accompt," 16; Cro. Eliz. 850; Ra. Ent. 18. 19. 20. It was argued that the plaintiff having charged the defendant as his bailiff upon the 1st March, he here excluded the day; this defect the court held to be fatal. See Co. Lit. 46; Cowp. 417; 4 T. R. 660; 1 Doug. 53. n. 15. Cowp. 417.

4. *COCKET v. ROBERT.* E. T. 1700. 6 P. C. Lutw. 47; S. C. Cro. Eliz. 82. The plaintiff declared that the defendant was the receiver of a certain sum of money due to him and his wife, and to render an account thereof when required; the defendant pleaded that he never was receiver of the said sum, or any part thereof. Issue was taken upon this, and its validity was admitted. Vet. Intr. 16; Ra. Ent. 17. 19. 21; 2 Rol. Ab. 683. f. pl. 1.

V. WAGER OF LAW.

1. *HODSDEN v. HARRIDGE.* M. T. 1668. K. B. 2 Saund. 61 to 64; S. P. MOOD v. THE MAYOR OF LONDON. 1701. K. B. 2 Salk. 682.

In this case it was said in argument, that where the plaintiff, in action of account, declares against the defendant on a receipt by his own hands, the defendant shall wage his law; but if the plaintiff declares on a receipt by other hands, the defendant shall be ousted of his law, on account of the presumption of law that the country had notice of it. Recognized in 1 Com. Dig. Accompt, E. 5. And see 1 Com; Rep. 272; Willea. 208.

2. *PAGE v. BARNES.* T. T. 1723. K. B. 6 Mod. 303.

An action of account was brought on the 4 & 5 Ann. c. 16. against the defendant as bailiff *ad merchandizandum*, the defendant waged his law; and upon demurrer it was objected, that wager of law would not lie in account against a bailiff *ad merchandizandum*; but that if it had been brought against a receiver, and the plaintiff had not shown by whose hands in that case a wager of law might be sustained. Judgment for plaintiff.

VI. OF THE JUDGMENT TO ACCOUNT, AND PUTTING IN BAIL THEREON.

1. *BISHOP v. EAGLE.* 1707. K. B. 11 Mod. 186; S. C. 10 Mod. 22.

On a writ of account brought by the churchwardens of St. Bartholomew, in London, against the defendant, it was said by the court upon a motion in arrest of judgment, that they might abate the declaration in part for uncertainty, and give judgment *quod computet* for the residue.

2. **HUGHES v. BURGESS**, T. T. 1737, K. B. Ca. Temp. Hard. 394; S. C. Andr. 19.

The defendant pleaded that he had fully accounted; and issue being joined thereon, the jury found for the plaintiff, and assessed damages and costs; and judgment was entered accordingly, and execution issued. The Court, on motion, set aside the judgment and execution, observing that the judgment was wrong, for it ought to have been only a preliminary judgment to account; and they compared the irregularity in this case to the irregularity of signing final before interlocutory judgment. See Cro. Eliz. 19; Winch, 5; Metcalfe's case, 11 Co. Rep. 38, a.

3. **REEVES v. GIBSON**, M. T. 1669, K. B. 1 Lev. 300; S. P. **LEWIS v. BAYLEY** cited in **KEEVES v. GIBSON**.

In this case the plaintiff insisted upon special bail, because the defendant intended going beyond the sea; but it was denied by the Court; for in account no special is to be found until judgment *quod computet*; and in Noy, 28, it was said by all the prothonotaries of the Court of Common Pleas, that the defendant upon the first writ should not be held to special bail, yet in peculiar cases, by the discretion of the Court, he shall find bail.

4. **CHESTER v. HUNT**, M. T. 1739, cited 1 Selw. 6, 5th ed. If the defendant, after the judgment to account, does not personally appear in court to give bail to account, there may issue a *capias ad compulandum* for the purpose of bringing him into court.

VII. OF THE APPOINTMENT AND AUTHORITY OF THE AUDITORS.

1. **SMITH v. SMITH**, H. T. 1818, K. B. 2 Chit. Rep. 10.

After judgment *quod computet*, a motion was made for the appointment of auditors. The Court, after inspecting the precedents produced by its officers directed two of the principal officers to be auditors.

2. **ARCHER v. PRITCHARD**, M. T. 1823, K. B. 3 D. & R. 596.

On an application being made to the Court to appoint auditors, a question arose whether the rule was only *nisi*, or absolute in the first instance. The Court, upon the authority of the preceding case of *Smith v. Smith*, were of opinion that it should be absolute in the first instance.

3. **WILLIAMS v. LEE**, H. T. 1668, K. B. 1 Mod. 42.

A motion was made for leave to enlarge the time for investigating the account before auditors. *Per Cur.* The power of giving further time is vested in the auditors; they are the proper judges whether the parties have been guilty of delay or not. If they find them remiss or negligent, the auditors must certify to the Court that they will not account. See 3 Bla. Com. 163; 1 Brownl. 24; F. N. B. 116; Co. Lit. 90; 2 Inst. 380; 4 Ann. c. 16.

VIII. OF THE PROCEEDINGS BEFORE THE AUDITORS.

1. **ANON.** T. T. 1675, C. P. 2 Mod. 100.

It was moved by the plaintiff in this case, that the plea is put in before the auditors ought to have been verified by oath. But no opinion was delivered

* The following was the form of the judgment in the celebrated case of *Godfrey v. Saunders*, 3 Wils. 88. "Therefore it is considered that the said T. S. account with the said T. G. of the time aforesaid in which he and the said S. S. were the bailiffs of him the said T. G. and had the care and administration of the aforesaid goods and merchandizes &c. to be merchandized and made profit of for the said T. G. and the said T. S. in mercy, because he hath not before accounted &c." And see Co. Ent. 46. b; Ra. Ent. 17.

† In *Godfrey v. Saunders*, 3 Wils. 73. three prothonotaries of the Court of Common Pleas were appointed auditors, and the entry on the record was as follows. And thereupon the said T. S. freely offered himself to account with the said J. G. for the goods and merchandizes aforesaid, whereupon by the consent of the said J. G. and T. S. W. M. Esq. L. J. Esq. and A. D. Esq. prothonotaries of the said court here, are by the said court here assigned auditors, to take and declare the said account between the said U. G. and T. S." 3 Wils. 88. 89.

‡ By stat. 4 Ann. c. 16. § 27. the auditors are empowered to administer an oath, and examine the parties touching the matters in question; and, for the trouble in auditing and taking such account, shall have such allowance as the Court shall judge reasonable, to be paid by the party on whose side the balance of account shall be.

The judgment of *quod computet* is essential though on ly interlocutory, and must be duly entered. After judgment to account special bail must be found.

[146] Or a writ of *capias ad compulandum* may be issued to bring the defendant into court. Two of the principal officers of the court appointed as auditors. A rule for the appointment of auditors is absolute in the first instance. The auditors, without application to the Court, may enlarge the time for investigating the account.†

Qu. if a plea before auditors need be verified by oath.

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on this point, but the Chief Justice (Sir Francis North) said that the plaintiff ought to have required the plea upon oath, otherwise it was unnecessary.

3. *BISHOP v. EAGLE*, E. T. 1710, K. B. 10 Mod. 23.

The defendant in his plea before auditors may admit the receipt of the money, and allege that he paid it over to the rightful owner.*

In an action of account by the present against the former churchwardens, they pleaded that the plaintiffs were not churchwardens; on which issue was joined, and a verdict given for the plaintiffs, and judgment *quod compentent*. The defendants before the auditors pleaded, that they received a certain sum of money as churchwardens through mistake, when none was really due to the parish, and perceiving their error they refunded the money to the rightful owner. To this plea the plaintiffs demurred. *Per Cur.* Admitting this to be a good plea before the auditors, it will be necessary for the defendants to plead such a plea as shows them to be honest men; viz. that they not only received the money by mistake, but also that they repaid it. Whereas if it was taken the other way, and to be a good plea in bar, a receipt by mistake will be no receipt at all, and it will not be necessary to show the repayment, but only that the money did not belong to the parish, therefore we are inclined to support the defendant's plea as far as possible. Besides, had the defendants paid the money to the parish before the knowledge of the mistake, the parish would have been chargeable with the amount; repayment was therefore an act done in discharge of the parish, and consequently a proper plea before the auditors. See 11 Mod., 186.

3. *GOSWELL v. DUNKLEY*, H. T. 1738, K. B. 1 Stra. 680.

A discharge to a common intent is sufficient.

The defendant pleaded that he carried the goods entrusted to him by the plaintiff to P. B. and in order to keep them safe till he had a convenient opportunity to sell them, put them into a warehouse, and that the warehouse was broken open by enemies, and that part of the goods was taken away and lost, and the other part had likewise been taken away; unless an Englishman had claimed them as his, and that the defendant was forced to come away before he met with the Englishman to obtain them again. Demurrer and joinder in demurrer. It was objected that this was no discharge, and 1 Roll. Ab. 124, 125; Yelv. 202; 1 Bulst. 101; was cited for the property being delivered to the defendant under a particular and special trust, he could not defend himself against the plaintiff's demand, by showing that he had lodged them in a warehouse, which was committing them to the care of a third person, in which case he would be answerable for the loss. *Per Cur.* This is *prima facie* a good account, if the warehouse was not a place of safe custody, that should have been replied; a robbery there is the same as if from his own person; for a bailiff *ad merchandizandum* is not obliged to keep the goods always about him. Judgment for defendant.

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4. *GODFREY v. SAUNDERS*, E. T. 1770, C. P. 3 Wils. 94.

The plaintiff being a merchant in L. and possessed of a considerable quantity of coral beads, shipped them on board vessels employed by the East India Company to be exported from England to Fort Saint George; by the usage of the trade every person exporting coral beads from England to Fort Saint George is obliged to make the returns for the same in diamonds, and to consign them to the governor of that fort for the time being, and to any other person the exporter shall think fit to intrust on his behalf. The defendant Saunders being governor, the plaintiff consigned his coral beads to him and S. S. to be by them received and disposed of, for the best advantage, at Fort Saint George, and to send to him the account of the sales, and to make him returns in diamonds best adapted for the market at L. The plaintiff in a writ of account declared that the defendant and S. S. from the 1st day of June, 1754, until the 1st day of May, 1755, were the bailiffs of the plaintiff at London, and during that time had the care and administration of divers goods of the plaintiff, viz. twelve chests of coral beads, containing (to wit) 3000 pounds weight (to wit) of the value of 12,000*l.* to be merchandized and made profit of for the plaintiff, when they T. S. and S. S. should be thereto required. Yet T. S. and S. S. in the life-time of S. S. or T. S.

* The defendant cannot, in this action, pay money into court. *Per Willes*, C. J. T. T. 27 Geo. 2. cited Buller N. P. 128.

since the death of S. S., have not, nor hath either of them, rendered an account of the same to the plaintiff; but both of them have refused, and the defendant Saunders still doth refuse, so to do, to the plaintiff's damage of 12,000*l*. The defendant pleaded several pleas in bar to the action; and upon the trial, the jury found for the plaintiff that the defendant Saunders and S. S. were the bailiffs of the plaintiff, and had the care and administration of the goods and merchandize of the plaintiff in the declaration mentioned, to be merchandized and made profit of for him, and to render account when they should be thereto required; that all concern of the defendants as to, and in the care, trust, and management of the said goods and merchandizes, or the produce thereof to be made in diamonds to the plaintiff, did not cease, nor was at an end, as the defendant in pleading had alleged, *i. e.* when defendant ceased to be governor of Fort Saint George.

The defendant upon this finding, was adjudged to account, and auditors duly assigned. Before the auditors defendant Saunders pleaded as to the goods and merchandizes whereof he is adjudged to render account to the plaintiff, for the time in which he the defendant and S. S. were bailiffs of the plaintiff, he the defendant prays an allowance of all the profit and produce of the said goods and merchandizes, and says he ought to be discharged thereof, because he says that before and during part of the time in which he had been bailiff for the plaintiff, the defendant was governor of Fort Saint George, and S. S. during all that time was a merchant factor, a correspondent of the plaintiff, and well skilled in the trade; and, further, that according to the usage and custom of the trade, and the rules and orders of the E. I. Company, still in force, and observed by them, every person exporting coral beads to Fort Saint George ought to make the returns in diamonds, and to consign the coral beads to the governor of the fort, and to any other person the exporter shall think fit, and that plaintiff exported 2311 lbs. 10 oz. 13 dwts. and 18 grains of coral beads, and consigned the same to defendant and Salomons, which were received by them both; and that on the 13th Oct. 1754, they sold part thereof for 5885*l*. 4*s*. 03-4*d*.; and on the 13th Jan. 1755, they sold the residue for 4175*l*. 8*s*. 61-4*d*.; and that S. sent an account thereof to the plaintiff; and that the defendant, on the 14th Jan. 1755, quitted the East Indies and all his concerns there, and returned to England, where he has ever since resided; and that when he left the East Indies, he, with the consent of the plaintiff, delivered over to S. the whole money and produce then received, and all the securities for the further produce to be received for the said coral beads, to make returns thereof in diamonds to the plaintiff; and this defendant is ready to verify; wherefore he prays allowance of all the profits and produce of the said goods and merchandizes, and that he may be fully discharged thereof. Demurrer to this plea. [149]

The Court on these pleadings propounded the following general principles: Matter plead-

That whatever matter can be pleaded in bar to the action must be so pleaded in bar; and whatever matter may be pleaded in bar, cannot afterwards be pleaded before auditors; the reason of this rule is to avoid unnecessary trouble and expense, to the litigating parties, which would be created by permitting the party to lie by and "plead before auditors what you might have pleaded in bar."

That if the party is once chargeable and accountable, he cannot plead in bar, but must plead before the auditors, except in the case of a release or *plene computavit*.^{*} These exceptions are admitted because a plea of release, or of *plene computavit*, having fully accounted, are total extinctions of the right of action, of which the Court is to judge; and even in these two cases, they must be pleaded specially, and cannot be given in evidence on the plea of *ne unques* receiver.

That nothing can be pleaded before auditors contrary to what has been before pleaded, and founded by verdict; because it would introduce either contrary to the previous finding of the jury.

^{*} When this course is pursued, and the matter pleaded in discharge is denied by the plaintiff, so that the parties are at issue, the auditors must certify the record to the Court, who will thereupon award a *scire facias* to try it; and if on such trial the plaintiff make a default, he shall be nonsuited; but after that he may bring a *scire facias* upon the first judgment. *Bul: N. P.* 138.

The defendant may plead that he delivered over the effects.

[150] After final judgment the plaintiff should pray that the body of the account be committed in execution or he may pray an *elegit*.
An action of assumpsit lies against a bailor to whom merchandise has been delivered, for not rendering a due account of the proceeds.† And in such an action it is no defence that the goods were exported without paying the duties, unless this evasion formed part of the original contract.

trary verdicts, which would perplex the Court; or two verdicts of identically the same kind, which would be nugatory and absurd.
That if a defendant has paid over as a trustee, he has executed his trust; and then it is a bar to the action; he never was accountable. Or it may be pleaded before the auditors, that the defendant, by the command of the plaintiffs, delivered over to a stranger the effects, because such a delivery is tantamount, in contemplation of law, to accounting with the plaintiff himself.*

IX. EXECUTION.

5. *ANDREWS V. ROBERT*, 1700, 1 Lutw. 51.

A motion was made by the plaintiff's counsel, that the defendant might be committed in discharge of his bail. The Court, after directing judgment to be entered, inquired if the plaintiff would have the defendant's body; when he prayed an *elegit*, which the Court said he was entitled to, if he preferred it to the security of the defendant's body. A *capias*, however, was afterwards issued.

Accounting Action for not. See tit. *Auction and Auctioneer; Principal and Agent*.

1. *SPURRAWAY V. ROGERS*, E. T. 1700, N. P. 12 Mod. 517.

In an action of assumpsit, on a promise to account, it appeared that the plaintiff had delivered merchandise and money to the defendant, who had engaged to return him the value in India produce. Per Holt, C. J. If a person receives goods of another, and expressly promises to be accountable for them, or to render account an action of assumpsit will lie, for a non-performance of the promise. See Carth; S. C. 1 Salk. 9; 2 B. & P. 36; 1 Saund. 50; 1 Taunt. 572; 2 Camp. 233; 5 Taunt. 431; S. C. 1 Marsh. 115, 6; ante, p. 139; Precedents for not Accounting, Petersdorff's Index, 5.

2. *CATLIN V. BELL*, E. T. 1815, N. P. 4 Campb. 183.

In an action against the defendant for not accounting, it was established in evidence, that the defendant's vessel, in which the goods had been exported, had cleared out of the custom-house in ballast, and that the duties payable on the exportation of the articles had not been paid. Per Lord Ellenborough, C. J. It is no defence that this property was exported without paying duties, unless you are prepared to show that the evasion formed part of the original arrangement between the parties. See the same principle recognized, *Gross v. La Page*, Holt, N. P. 105; *Wilkinson v. Laudonsack*, 3 M. & S. 117; *Tenant v. Elliot*, 1 B. & P. 3; *Farmer v. Russel*, 1 B. & P. 296.

Account stated.

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[151] A defendant ought not to be holden to bail on an account stated, with out allowing for counter claims. And if the plaintiff does, it is error with out reasonable and prob-

I. WHEN DEFENDANT MAY BE HOLDEN TO BAIL ON.

1. *DR. TURLINGTON'S CASE*. Cited 4 Burr. 1996.

Per Lord Mansfield. In Dr. Turlington's case he swore to the sum due upon one side of the account only, without regarding the other side of it. But this was a mere evasion, and so treated.

2. *DROMFIELD V. ARCHER*, H. T. 1822, K. B. 5 B. & A. 513; S. C. 1 D. & R. 67.

On showing cause against a rule which had been previously obtained requiring the plaintiff to show cause why the defendant should not have his costs under the stat. 43 Geo. 3. c. 46, §. 5. it appeared that the plaintiff had

* Wilmet, C. J. concluded the judgment of the Court with expressions of his own approbation to see the ancient mode of proceeding revived.

† But not until demand made of an account. *Topham v. Braddick*, 1 Taunt. 572.

arrested the defendant, and held him to bail for 20*l.* knowing that the latter had a cross demand which would reduce the debt to 6*l.* and upon the trial he recovered the latter sum only. It was contended that here there was a probable cause for the arrest; the statutes of set-off not being compulsory, the plaintiff could not be certain whether the defendant would set off the debt due to him or not.

Sed Per Cur. Where there are cross demands between parties, and the balance due to the plaintiff does not amount to a sum for which a defendant may be arrested and holden to bail, we think that such an arrest is within the spirit of the third section of 43 Geo. 3. c. 46. and must be considered as an arrest "without any reasonable or probable cause." Rule absolute.

3. *BROWN v. PIGEON.* H. T. 1811. N. P. 2. Campb. 594.

In an action for maliciously holding to bail it was proved in evidence that there had been mutual dealings between the parties, and that the plaintiff had arrested the defendant, from whom a large sum was due for the balance of the account only, and that the latter had afterwards arrested the plaintiff for the smaller sum due to himself. It was submitted that under these circumstances, it must be deemed arrest without any probable cause. *Per Lord Ellenborough, C. J.* As the cross demands were separate and distinct, and the statutes of set-off not being compulsory, I think this action cannot be supported. At the time of the arrest the defendant had not only a probable but a real cause of action against the plaintiff; and although the conduct of the defendant may be highly censurable, yet it cannot be deemed a malicious holding to bail without probable cause. See *Dromfield v. Archer*, *supra*; and *Middleton v. Hill*, 1 M. & S. 240; *Feely v. Reed*, 5 B. & A. 515, n; *Petersdorff on bail*, 426-7.

bable cause and within the 43. G. 3. c. 66; and as such the plaintiff is liable to costs.

costs.

that an action for maliciously holding to bail could not under such circumstances be supported.

The affidavit must distinctly show the amount of the balance and that the amount of the suit is for the recovery of such balance.

[152] Saying that the defendant owes to plaintiff so much money laid out and expended upon the balance of accounts is insufficient. *Semb.* A request should be alleged.

II. AFFIDAVIT TO HOLD TO BAIL ON.

1. *HATFIELD v. LINGUARD*, H. T. 1795, K. B. 6 T. R. 217.

The affidavit in this case stated "that the defendant was indebted to the deponent in the sum of 427*l.* and upwards, under and by virtue of a certain agreement in writing, bearing date and entered into between him this deponent and the said defendant, whereby he the said defendant undertook and engaged that he, together with A. B. should pay and discharge, on or before, &c. the balance of all subsisting accounts between them, which said balance is still due and unpaid to the deponent;" it was holden to be defective as it left the amount of the balance to be inferred, instead of the allegation of that fact being positive and certain.

2. *EICKE v. EVANS*, E. T. 1820, K. B. 2 Chit. Rep. 15.

It was alleged in an affidavit to hold to bail, that the defendant was indebted to the plaintiff in 1500*l.* "for money laid out and expended by the deponent for the said defendant, and upon the balance of accounts." The affidavit was held not sustainable, because it did not specify how much was due upon the balance of accounts, or of what the balance consisted, or whether it had been liquidated by the defendant.

3. *JONES v. EVANS*, H. T. 1823, K. B. MS. cit. in *Petersdorff on Bail*, 158, n. s.

The question was, whether on an affidavit to hold to bail in an action for money paid, a request should be stated. The court said, that in other cases respecting money had and received, and on account stated, it is necessary to swear to a request.

III. EFFECT OF, AND WHEN SUSTAINABLE.

1. *TRUEMAN v. HURST*, M. T. 1785, K. B. 1 T. R. 40.

Declaration in assumpsit, on a promissory note given by the defendant for An account board, lodging and instructing him in the business of, &c.; and counts for meat, &c. and other necessities; work and labour; money paid, laid out, and expended; and on an account stated. Plea, infancy. Replication for necessities; demurrer thereto, and joinder in demurrer. It was contended for the defendant, 1st. That an infant cannot bind himself by a promissory note; 2dly. There was no good consideration for the note, or for the promises.

An account stated can not be supported against an infant even for necessities.

in the fourth and fifth counts, which were for work and labour; thirdly, an infant is not liable on an account stated.

Per Cur. This action cannot be sustained. What is an account stated? It is an agreement by both parties that all the articles are true. This was formerly considered conclusive; but a greater latitude has of late prevailed, in order to remedy the errors which may have crept into the account in surcharging the items. But an infant cannot bind himself by stating an account. Judgment for the defendant, but the plaintiff had liberty to amend on payment of costs. See 2 Stark, 36; 2 Roll. Rep. 271; 5 Mod. 368; 2 Saund. 124; Carth. 160; Moore, 679; 1 Lev. 86; Cro. Jac. 491; 1 Roll. Ab. 729; 1 Lutw. 169; Noy, 87; Palmer, 528; Bull. N. P. 129; 1 Campb. 552; Cro. Eliz. 920; 12 Mod. 517; 6 Esp. 24; 1 Sel. N. P. 130; Chit on Bills, 16, 97.

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After an ad-
justment of
mutual de-
mands, and
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struck, it
cannot be
objected
that part of
the plain-
tiff's de-
mand was
that for
which the
action
could not
have been
originally
supported.

2. DAWSON V. REMNANT, H. T. 1806, 6 Esp. 24.

The declaration contained counts for goods sold and delivered, with a count on an account stated. Plea, general issue, with notice of set-off. The action, it appeared, was brought to recover 8*l.* 15*s.* the balance of an account; the defendant endeavoured to reduce the amount 5*l.* by proving that the demand was for spirituous liquors delivered at different times in less quantities than the value of 20*s.* and, therefore, according to the stat. 24 Geo. 2, s. 12, not recoverable. The plaintiff, to defeat this objection, proved that the defendant had done work for him as a plumber, and that they had mutually adjusted their claims, and that this action was brought for the balance. *Per Mansfield, C. J.* As credit has been given for the amount of the spirits sold in quantities under the value of 20*s.* in the settling of the accounts between these parties, I think in an action for the recovery of an ascertained balance, these items cannot be disputed. The plaintiff is therefore entitled to a verdict. Verdict for plaintiff. See Spencer v. Smith, 3 Campb. 10; Scott v. Gilmore, 8 Taunt. 226; Burylat v. Hutchinson, 5 B. & A. 241.

3. PRACOCK V. HARRIS, T. T. 1808, K. B. 10 East, 104.

A defend-
ant, after
accounting
with the
plaintiff, as
invested
with a par-
ticular char-
acter, and
receiving
credit from
him in that
capacity, is
estopped
from disput-
ing his title
to the par-
ticular char-
acter.

Declaration in assumpsit by the plaintiff as collector or renter of turnpike tolls, with a count of an account stated. Plea, general issue. At the trial it appeared in evidence, that the plaintiff had made out an account of what was due to him from the defendant, and that such bill had been duly delivered to the defendant, and on the receipt of it he had remitted a sum of money in part payment, and had promised to pay the remainder in the ensuing week. It was urged, on the part of the defendant, that the appointment of the plaintiff had, in several respects, been irregular, and inconsistent with the local act by which the tolls were granted, and that some of the charges were unauthorised by the legislature. A verdict was found for the plaintiff, with liberty to move to enter a nonsuit; but after a rule had been granted, and cause shown, it was held, *Per Cur.* The evidence of an account having been stated between these parties is amply sufficient to warrant the opinion we have formed. The letter in which part of the money was enclosed states that the plaintiff shall have the remainder next week; these words manifestly had reference to some account previously adjusted and settled. It was for the jury to determine whether the letter did or did not allude to the account delivered by the plaintiff; they have found that it did. On this conclusion another point, as a necessary corollary, is established; that as neither the trustees, nor the creditors of the turnpike have taken any objection to the plaintiff's bill, the defendant, a third person, cannot be permitted to do so after having treated with him as a person legally entitled to receive tolls, and having actually settled an account with him for the amount. This recognition of the plaintiff's right to the character he has assumed is conclusive against the defendant. Rule discharged.

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Under a
count on an
account sta-
ted, where

4. SALMON V. WATSON, M. T. 1819, C. P. 4 B. Moore, 73.

This was an action for goods sold and delivered, with a count on an account stated. It appeared that the defendant had agreed verbally with the plaintiff to take a house, and purchase the fixtures, at a valuation to be made

by two brokers; and that he had afterwards agreed to take part of the furniture; and that an inventory of the furniture and fixtures was accordingly made, described generally as "An inventory of the fixtures," &c. with the gross amount placed at the foot of the document. The defendant subsequently took possession of the house, and enjoyed the use of the fixtures and furniture, and paid part of the sum at which they were valued by the brokers. For the defendant it was contended, that the plaintiff was not entitled to recover on the authority of the case of *Lee v. Risdon*, 2 Marsh. 495. where it was decided, that an action for goods sold and delivered would not lie for fixtures, and consequently, that the plaintiff could not resort to the count for goods sold, and that he must be bound by the inventory in which the brokers had made their valuation for fixtures, and that consequently the contract was entire, and that he could not go for less than the whole of the amount of the valuation; and as the greater part of that sum was for fixtures, he could not recover for the furniture, which formed the other part of the inventory. For the plaintiff it was insisted, that he had a right to recover for all the articles of furniture which it was proved the defendant had taken possession of, and which could not come under the denomination of fixtures; that although the brokers had included certain articles of furniture as fixtures in the inventory, that could not change their character, but that the different descriptions of furniture and fixtures were to be taken according to their avowed import; and that the furniture not having been included in the agreement at the time the house was taken, but a matter of subsequent purchase, for which the defendant should pay, without any reference to the fixtures, and for which the plaintiff was entitled to a distinct action for goods sold and delivered, and that he could not be deprived of his right to recover by the mistake of the brokers; that the contract, as well for the fixtures as the furniture, was executed; and that as the defendant was in possession of both, the plaintiff might recover for the fixtures on the count for an account stated. *Per Cur.* There appears to be no little difficulty in separating the articles of furniture from the fixtures, as valued by the brokers in this inventory; still, however, we are of opinion that the plaintiff's case may be supported on the account stated, especially as the defendant has had the enjoyment of the property, and paid a sum in part liquidation of the amount at which it was valued.

6. *BARLOW V. BROADHURST*, T. T. 1820, C. P. 4 Moore, 471.

In *assumpsit*, the declaration set out an instrument, purporting to be a promissory note, which, after reciting that the defendant had been awarded to pay 600*l.* to the representatives of A. R. and that he had paid him 100*l.* in his life-time, and thereby promised to pay his representatives the remainder three months after his death, pursuant to the award, first deducting any interest on money which he (the testator) might owe to the defendant on any account. The plaintiff then averred the testator's death, and that they became his executors; the declaration likewise contained the usual money counts, and accounts stated. Plea, *non assumpsit*. On the trial it appeared that this instrument was not properly stamped; and the question arose, whether it could be received in evidence under the count upon an account stated. *Per Cur.* This instrument could not have been declared on as a promissory note; it is not for the payment of a fixed and definite sum of money, but subject to deductions, which must rest entirely on contingency. The facts disclosed in the declaration alone show that there was an account stated between the defendant and testator; the recital in the note demonstrate that it was given to secure the payment of a larger sum of money, which is a direct admission by the defendant that a sum of money, as a balance, was due from him to the testator. We are, therefore, of opinion, that this memorandum might be admitted in evidence under the account stated, though improperly stamped as a note. See *Watkins v. Hewlett*, 3 B. Moore, 211; *Chit on Bills*; 363. 367.

An instrument purporting to be a promissory note, but improperly stamped, is admissible in evidence under a count on account stated.

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In an inferior court, alleging in the declaration that the defendant became indebted upon an account stated within the jurisdiction is sufficient; *sed quæ.*

And it suffices to allege that an account was stated within the jurisdiction, with an averring that the items of the account accrued there.

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A plea that the parties stated an account, and mutually agreed to be quit one against the other, except as to the balance is bad as it amounts to the general issue.

So if it states generally that they accounted.

The plaintiff will not be obliged in support of the count on an account

IV. PLEADINGS CONNECTED WITH.

1. SPACKMAN V. HUSSEY. E. T. 1722. K. B. 8 Mod. 77.

The plaintiff declared, in the Marshall's Court, on an *insimul computasset infra jurisdictionem*, &c. and obtained judgment; and upon a motion being made to set it aside, on the ground that the account did not alter the duty, for want became that may arise in York, and no other consideration being stated to entitle the Court to jurisdiction, the judgment ought to be reversed. *Per Cur.* The account alone was sufficient to give the Court a jurisdiction. See 2 Ld. Raym. 1555; Stra. 827; 6 Mod. 223; 2 Show. 546; 1 Ld. Raym. 211; Cowp. 20; 2 Wills. 16; 1 T. R. 151; 6 T. R. 764; 8 T. R. 127; 1 Saund. 73-4.

2. ANON. H. T. 1728, K. B. Fitzgib. 44.

On a writ of error brought on a judgment given in an inferior Court in assumpsit, the plaintiff declared that there having been an account between him and the defendant, and the defendant having become indebted to him in several sums of money within the jurisdiction of the Court, had mutually accounted together, and that on the account stated, it appeared that the defendant was indebted to the plaintiff in such a sum, which he promised to pay the plaintiff, &c. The error insisted on was, that the cause of action arose where the consideration, to wit, the *valore recepto*, was received, and, in this case, the same not being laid to be *infra jurisdictionem curiæ*, the judgment is erroneous; for nothing shall be intended to be within the jurisdiction of an inferior court but what is specially alleged, and laid so to be; hence this contract not being laid to be made *infra jurisdictionem curiæ*, the judgment ought to be reversed. The defendant's counsel argued, that it was not necessary to lay a venue for the *valore recepto*, and therefore it need not be

laid *infra jurisdictionem*. In the present case the promise was for several sums of money which become due within the jurisdiction of the inferior court, and which were ascertained by stating the account between the plaintiff and the defendant; and a venue is laid for the defendant within the jurisdiction of the inferior court, where the action was brought. *Per Cur.* If the *valore recepto*, which arose on stating the account here, is a new cause of action arising, which should have been laid *infra jurisdictionem*, &c.; but it does not; and therefore the promise was brought for the original debt, which is laid to arise within the jurisdiction of the court; and therefore the judgment must be affirmed.

A plea that 3. MAY V. KING. E. T. 1698. K. B. 1 Ld. Raym. 680; S. C. 12 Mod. 537.

To an action of assumpsit for 50l. the defendant pleaded that he had come to an account with the plaintiff, and that on such account the plaintiff was found to be in arrear, and indebted to him in the sum of 5s.; and that on the settlement of the account it was mutually agreed between them, that they should be each discharged from any liability, except the 5s. The plaintiff demurred; and excepted to the plea, on the ground of its being equivalent to the general issue. *Per Cur.* This plea is bad; the matter disclosed in it ought not to have been pleaded specially; it is in effect the general issue, and might have been given in evidence under *non assumpsit*. The plea was waved by consent, and the defendant pleaded *de novo*. See 3 Bl. Com. 309; Com. Dig. Pleader, E. 13, 14; Bac. Ab. Pleas, G. 3; 6 East. 597; 8 East. 313; 1 Saund. 228. c; Hob. 127; 1 Leon. 178; 2 Rol. Rep. 140; Doct. pl. 140; 3 Lev. 40.

4. ROLLS V. BARNES. M. T. 1756. C. P. 1 Bl. Rep. 65.

It was held by the Court, on the authority of Adderly and Evans, H. 29. Geo. 2. that *insimul computasset* was not a good plea in bar to an action on assumpsit; for though true, it does not extinguish the original promise on which the action is founded.

V. PROOF OF.

1. BARTLETT V. EMERY. H. T. 1728. K. B. Cited 1 T. R. 42. n.

In arguing this case upon a writ of error out of the Court of Litchfield, Raymond, C. J., Page and Reynolds, J. agreed, that on an *insimul computasset* the plaintiff is not obliged to give evidence of the several items consti-

tuting the account, but it is sufficient if he prove the account stated, for that it is the account of the action. See *Bul. N. P.* 129.

2. *KNOWLES AND OTHERS V. MITCHELL AND ANOTHER*, H. T. 1811, K. B. 13 East, 249.

In this case it appeared that the plaintiffs had sold to the defendants some standing trees, which the defendants afterwards procured to be felled and taken away; and both the defendants had admitted that they had bought the trees for nine guineas; and one of them said he would only pay one-half. An action of assumpsit was brought upon the common counts, for goods sold and delivered, the money counts, and upon an account stated. The plaintiff was non-suited; on the objection that the evidence did not support the action, the contract being for standing trees, which were part of the realty. A rule nisi was granted to set aside the nonsuit. *Per Cur.* The acknowledgment of the price to be paid for the trees being made after they were felled and applied to the use of the defendants, is sufficient to sustain an action on an account stated; notwithstanding there is no other item of account between the parties.

Rule absolute.

3. *HIGHMORE V. PRIMROSE*, E. T. 1816, K. B. 5 M. & S. 65.

On a rule to show cause why a verdict should not be set aside and a nonsuit entered, it appeared that the action had been brought on a bill of exchange, the declaration containing a count on the bill, the money count and an account stated, to which the defendant had pleaded the general issue. It was contended that the bill being misdescribed in the declaration, the mere proof that the defendant had admitted his liability on the bill, upon being applied to for payment, was not sufficient evidence to support the count upon an account stated, the defendant's admission being exclusively confined to that item. *Per Cur.* Although the bill is misdescribed in the declaration, yet the plaintiff is entitled to recover under the account stated, for the case of *Knowles v. Michel*, *vide supra*, has expressly determined that point. Now there seems to us to be no reason why an account should not be stated, consisting of one item only, as well as of plurality; the language of the plea being "of and concerning divers sums of money" makes no difference; "divers" may be supported by proof of one item. We are, therefore, of opinion, that the plaintiff is entitled to retain his verdict. Rule discharged. See *Grant v. Da Costa*, 3 M. & S. 351; *Bartlett v. Emery*, 1 T. R. 42. n; *Dalby v. Cook*, Cro. Jac. 234; *Thompson v. Spencer*, *Bul. N. P.* 129.

4. *TEALL V. AUTY*, T. T. 1820, C. P. 4 Moore, 543; S. C. 2 B. & B. 99.

Action of assumpsit to recover the balance of an account for timber or trees; the declaration contained counts for goods sold, money, and account stated. Plea, general issue, non assumpsit. At the trial it appeared in evidence, that at the time of the sale of the timber a memorandum was made of the bargain, but it was neither stamped nor signed by either of the parties. A witness proved that defendant had admitted there was a balance due to the plaintiff, but was unable to state with precision the amount. The memorandum and handwriting of the party was then proposed to be proved, when it was objected to as inadmissible, being neither signed nor stamped; and further, that as that memorandum was unavailable, there was no written contract, although it was the sale of standing trees which conveyed an interest in the realty. The judges presiding at the trial adopted this opinion, and the plaintiff was nonsuited with leave to move to set it aside. A rule nisi was accordingly obtained that the nonsuit might be set aside, and a verdict entered for the plaintiff for 45l.; and *Knowles v. Michel*, 12 East, 249. (ante p. 157.) was cited, where it had been determined that an admission by the defendant that he had bought trees of the plaintiff for a certain sum of money, and that he had cut them down and carried them away, would support a count upon an account stated, though not for goods sold; it was therefore submitted that no written evidence of the contract was necessary.

Per Cur. If it had been proved that a certain sum was agreed to be paid by the defendant as the balance due to the plaintiff, the case of *Knowles v. Michel* would be expressly in point; but there the defendant admitted a precise

count stated, to give evidence of the several items constituting the account.

[157] An admission by the defendant that he had bought standing trees of the plaintiff for a certain sum, and carried them away will support a count upon an account stated.

Proof of one item is sufficient to maintain an action upon an account stated.

Evidence of an admission that a balance is due to the plaintiff, without proving a fixed and definite sum, will support a count on an account stated.

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sum to be due; that case therefore does not meet the present, in which the difficulty is to ascertain what is due, no promise having been proved by the defendant to pay a definite and certain sum, but merely the balance due from him to the plaintiff. See 6 T. R. 452; 12 East, 237; 2 B. & A. 473; 2 Stark. 277.

Semb. An indictment may be supported for tearing an account after it has been settled and signed. The sum stated in the account should correspond with the amount sought to be recovered.

VI. WHEN AN INDICTABLE OFFENCE, TO DESTROY.

THE QUEEN v. CRISP, T. T. 1703, K. B. 6 Mod. 175.

On an indictment for a misdemeanor, it appeared that an account had been stated between defendant and A. by which defendant appeared to be indebted to the latter in a certain sum; the defendant signed the account and afterwards obtained possession of it by false pretences, and *vi et armis* tore it *contra pacem*, &c. It was moved that the indictment should be quashed:—1st. Because it was a private offence not indictable. 2d. Because it did not show in whom the property in the paper was vested. *Per Cur.* We must refuse the motion, for it was a trespass *ab initio*. The property is his who was entitled to the debt on the account; and directed the defendant to try it, or demur at his peril. See Comb. 16; 12 Mod. 413; 4 Com. Dig. Indictment, D; Stra. 595; 1 Ld. Raym. 316.

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But it is now settled, that a variance in that respect is no irregularity, and will not afford even a ground for discharging defendant on common bail. Where the process "to answer the plaintiff in a plea of debt" (in stead of trespass, with an *ac etiam* in debt) the Court allowed it to be amended; Or if the mistake be not material, the Court will overlook it altogether, as where the *ac etiam* was to answer the plaintiff "in a

Ac etiam, in, Process.†—See also tit. *Affidavit of Debt; Bail; Declaration.*

1. THOMPSON v. COLLINS, Cited by Holt, C. J. in CARIBALDO v. COGNONI. M. T. 1703, K. B. 6 Mod. 226.

In an *indebitatus assumpsit* the declaration and recovery was for more than the *ac etiam* in the writ, and though it was offered to make it correspond with the *ac etiam*, by entering a remittitur on the record for the difference, yet it was denied on debate.

2. TURING v. JONES, M. T. 1793, K. B. 5 T. R. 402.

The defendant was in custody on a bailable *latitat*. An application was made to the Court for his discharge on the ground that the declaration and *ac etiam* varied in the amount, notwithstanding the action was in debt, and instituted for the recovery of a sum certain. *Sed per Cur.* There is no incongruity in these proceedings; the process does not appear on the record; and therefore the assumed analogy between actions by original and by bill fails. No case can be cited where an objection as to the sum has been allowed to prevail. See post, tit. Declaration; 2 B. & P. 358; 6 T. R. 158; 2 Saund. 52. a.

3. COX v. MUNDY; E. T. 1730, K. B. 1 Bl. Rep. 462.

A motion was made to stay proceeding on a bill of Middlesex, which was in debt only, and not in trespass, with an *ac etiam* in debt for a penalty incurred by defendant having foreign lace in his house. Lord Mansfield, C. J. refused a rule to show cause unless a precedent could be produced; but on its being moved again when Denison, J. was present, the bill was ordered to be amended by inserting the words "in a plea of trespass."

4. CALLAGHAN, ONE, &c. v. HARRIS, H. T. 1769, C. P. 2 Wils. 392.

The plaintiff had sued out an attachment of privilege to answer the plaintiff in a plea of trespass, and also to a certain plea of trover, for converting the goods and chattels of the plaintiff for 12d. The defendants having been arrested upon this writ, and held to special bail, a motion was made for a rule to show cause why a common appearance should not be accepted for the de-

* It is now, however, a clearly established principle of law, that an indictment will not lie for a bare trespass; Rex v. Johnson, 1 Wils. 325; Sayer, 27; for the words *vi et armis* alone are not sufficient; Rex v. Storr, 3 Barr. 1698; Rex v. Atkins, 4 Barr. 1706. There must be such an actual force as implies a breach of the peace to make a trespass an indictable offence; Rex v. Blake, 3 Barr. 1731; and this degree of actual force must appear on the face of the indictment; Dougl. 154. See also 1 Russel, 70; 4 M. & S. 214. 1 Ld. Raym. 366; 3 Salk. 189.

† Anterior to the stat. 13 Char. 2. stat. 2. a. 2. a defendant might have been arrested and bidden to bail for any sum of money upon a common bail of Middlesex, or *latitat, &c.* not

defendants on the ground that the *ac etiam* did not particularly express the cause of action, as the statute of 12 Char. 2. c. 2. §2.* directs; there being no such action as a plea of trover, it ought to have been a plea of trespass upon the case. Upon showing cause it was submitted for the plaintiff, and resolved by the court that the cause of action is clearly and fully expressed; and although the *ac etiam* be not exactly clerical, yet nobody who reads it can doubt of the cause of action; besides since the statute of *ac etiam*, 13 Char. 2. the statute of 12 Geo. 1 c. 29. has enacted that no person shall be held to special bail before an affidavit is made and filed of the cause of action, which has been done in this case; so that the defendants have had notice from the affidavit of the cause of action; that if that affidavit be sufficient, the Court cannot admit of a common appearance. Rule discharged.

5. BARBER v. LLOYD. T. T. 1789. K. B. 2 T. R. 513.

A bill of Middlesex was to answer the plaintiff in a plea of debt instead of trespass, and also a bill to be exhibited in a plea of trespass on the case. The Court, on the authority of a case read from the master's book, refused to grant a rule to set the bill aside. A similar application had been also refused in H. T. 1783. K. B.

6. LOCKWOOD v. HILL. H. T. 1790. C. P. 1 H. Bl. 310.

A motion was made for permission to enter an *exoneretur* on the bail piece, on the ground that the *ac etiam*, in the process against the principal was "in a certain plea of trespass on the case on promise for 25l." the plaintiff having declared in debt for 260l. *Sed per Cur.* The statute 13 Car. 2. c. 2. which requires the cause of action to be expressed in the writ, and which gives rise to the clause of *ac etiam*, operates only where the sum is above 40l.; when, therefore the debt is under that sum, the *ac etiam* is not necessary.

7. THE KING *qui tam* v. HORNE. T. T. 1791. K. B. 4 T. R. 349.

On motion to show cause why a bill of Middlesex should not be quashed, and the subsequent proceedings stayed for irregularity, it appeared that the action had been commenced by common process, in debt on the lottery act, without specifying the amount of the penalties, or giving any information to the defendant of the nature of the action. In support of the application it was submitted, that as the 27 Geo. 3. c. 1 enacts, "that upon every action, plaint, bill, &c. instituted or issued for the recovery of penalties, shall specify the amount of penalty or penalties sued for," the common form was improper, the words of the act being imperative, and the requisite there pointed out indispensable. In answer to this proposition it was argued that the statute having given an action of debt generally, the clause adverted to could only have reference to cases where the defendant was to be holden to bail. *Sed per Cur.* The

expressing the particular cause of action. To remedy this mischief it was enacted, that no person arrested by any sheriff by force or colour of any bailable writ, bill, or process, issuing out of the King's Bench, wherein the certainty and true cause of action is not expressed particularly, shall be compelled to give security for his appearance in any penalty, or sum of money, exceeding the sum of 40l. This statute, says Mr. Justice Blackstone, (without any such intention in the makers,) had like to have ousted the King's Bench of all its jurisdiction over civil injuries without force, for, as the bill of Middlesex was framed only for actions of trespass, a defendant could not be arrested and holden to bail thereupon for breaches of civil contracts. But notwithstanding this statute, the defendant might still be arrested and holden to bail upon a common bill of Middlesex, or latitat, &c. for any sum not exceeding 40l.; and where it was for a larger sum, a method was devised to prepare the jurisdiction of the Court, and at the same time to authorise an arrest, by inserting an *ac etiam*, or special clause, beginning with these words; shortly describing the true cause of action in addition to the general complaint of trespass. And a rule of court was made upon this statute, that no attorney should make any precept or writ, with a clause of *ac etiam*, &c. against any heir, executor, or administrator, nor in any case where, by the course of the court, special bail was not required. See further as to the origin of this statute and its effect, Petersdorff on Bail, 9 to 16.

* The 4th section of the statute 13 Char. 2. c. 2. was not mentioned, which says, "This act shall not extend to any attachment of privilege at the suit of any privileged person, and upon such writs of attachment such course shall be taken for security for appearance as hath been used." From this section it seems there is no occasion to insert an *ac etiam* of the particular cause of action in an attachment of privilege at the suit of an attorney, in order to hold a defendant to bail.

[161] observance of the special form directed by the legislature to be introduced in the process is essential to the validity of the proceedings; and it not having been done in this case, the process is irregular, and must be set aside. See 4 T. R. 587; 6 T. R. 617; 2 H. Bl. 601.

8. *DAVIDSON v. FROST*, E. T. 1802. K. B. 2 East, 305.

An omission in the ac etiam part of the writ when the cause of action is above 40% of the sum for which the defendant is to be held to bail is irregular.
The defendant had been arrested and held in bail for 1771. without the amount having been inserted in the process, according to the 13 Car. 2. stat. 2. c. 2. and the rule of H. T. 2 Geo. 2. In showing cause against a rule obtained for discharging the defendant on common bail, it was argued that since the enactments of 12 Geo. 1. c. 29. that no person shall be holden to bail upon process out of the superior courts for less than 10*l*. and that an affidavit for debt shall be made, and that the sum sworn therein shall be endorsed upon the back of the process and that the sheriff shall not take bail for more, the insertion of the sum in the ac etiam is wholly nugatory, because neither the sheriff nor the party is bound by it, but only by the sum sworn to and endorsed on the back of the writ. But the Court considered the process irregular, and observed that attempts to vary from the established forms without the authority of the Court ought to be discouraged. Rule absolute.

9. *MUNROE v. HOWE*, H. T. 1819, K. B. 1 Chit. Rep. 171.

Of omitting to insert the particular form of action.
A rule had been obtained to show cause why the bail bond given in this action should not be cancelled, and the defendant discharged out of custody on filing common bail, on the ground that the ac etiam part of the bill of Middlesex, on which the defendant had been arrested, had not set out the true cause of action, as prescribed by the 13 Car. 2. st. 2. c. 2. but simply stated the sum of 300*l*. without proceeding to allege that the money was due on the promises; *Per Cur.* The decision in *Davison v. Frost*, 2 East, 305. (*supra*) is a decisive authority in favour of the present application. It is impossible in this case to discover whether the action be trespass or assumpsit. The precise cause of action should be stated in the ac etiam according to the statute and the established practice. Rule absolute.

10. *KERVÆ v. FOSSET*, E. T. 1817, C. P. 1 Moore, 147; 5 C. 7 Taunt. 458. *S. P. FORBES v. PHILLIPS*, H. T. 1806, 2 N. R. 98.

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If the writ begin as a writ against two defendants and the ac etiam be only against one, that one only should be arrested, and the plaintiff may declare against him alone.
On a motion to set aside proceedings, it appeared that A. B. and C. were indebted to the plaintiff on a joint and several bond; that the plaintiff had sued them all severally by three writs of capias, in one of which A. and B. were named, but B.'s name was omitted in the ac etiam part of the process. The plaintiff made an affidavit against A. only, and declared against A. and B. separately, and the sheriff arrested both of the defendants. Two other writs were issued against the defendants B. and C. separately, on which they were arrested accordingly. *Per Cur.* The analogy between the facts of this case and those which gave rise to the decision of *Forbes v. Phillips*, 2 N. R. 98. renders the judgment given in that case conclusive against the present motion. It has been urged that this was a writ against two defendants, and that therefore one only could not be arrested on it. We perfectly concur in that proposition; but the name of B. in the capias may be substituted for that of Richard Roe, and taken as equivalent to the introduction of the name of a nominal party. The ac etiam is the only operative part of the writ which points out the person against whom the action is to proceed, and by which judgment is obtained. Richard Roe is joined in every writ, but is not declared against. The Court cannot distinguish between the name of Richard Roe and any other person. See *Moss v. Birch*, 5 T. R. 722; *Spencer v. Scott*, 1 B. & P. 19; *Stables v. Ashby*, 1 B. & P. 49; *Dalton v. Barnes*, 1 M. & S. 230; *Shawman v. Whalley*, 6 Taunt. 185; *Gent v. Abbot*, 2 B. Moore, 301; 3 Taunt. 304; *Maberly v. Benton*, 5 B. Moore, 483.

Acknowledgement.—See tit. Bond; Evidence; Limitations, Statute of; Principal and Agent; Stamp.

Acorns.—See tit. Tithes.

Acquiescence.—See tit. Appeal; Highway; Nuisance; Way, Right of.

Acquittal.—See tit. Assault and Battery; Autrefois Acquit; Burglary; Conspiracy; Highway; Malicious Prosecutions, Perjury; Post Office.

Acquittance.—See tit. Bill of Exchange; Composition with Creditors; Forgery; Payment; Receipt; Release.

Acres.

1. **REX v. EVERARD**, H. T. 1700, K. B. 1 Salk, 195; S. C. 1 Ld. Raym. 638; Holt, 173.

On a presentment at a court leet for erecting a cottage, &c. contrary to 31 Eliz. c. 7, s. 1, being removed into the Court of King's Bench by *certiorari*, it was contended, on the authority of Stowe's case, Cro. Jac. 603, that the 33 Edw. 1, c. 6, was not a statute, but only an ordinance. The proposition, however, was denied by the Court. See 33 Ed. 1; 24 H. 8, c. 4; 2 Inst. 737; Co. Lit. 69, a; Spelm. Gloss v. Acre, *particula terre perica pes forette rodo terre*; Cow. Interp. v. Acre.

2. **WADDY v. NEWTON**, T. T. 1723, K. B. 8 Mod. 275.

On a special verdict in ejectment it appeared that a tenant in tail had covenanted to levy a fine and suffer a common recovery of the lands in question, and also of a fishery; and that he had accordingly levied the fine, describing by the ten the parcels as 120 acres of land in Stockwell-hall, in the county of, &c. and of the ten acres of land, covered with water; and declared the use thereof to himself and heirs. But there being more than 140 acres statute measure, (but only that number according to the local mode of admeasurement,) the defendant, who was heir in tail, defended the action for all the land beyond the one hundred and forty acres. The jury found that the fine had been levied, and the recovery duly suffered by the name of 120 acres of land and of ten acres of running water, and that the whole estate entailed was computed to be 140 acres of land.

For the plaintiff it was contended, that all the entailed property was comprised under the description of one hundred and forty acres of land, and that this construction was consistent with the intent of the tenant in tail, who had levied the fine; that admeasurements are to be ascertained by a jury according to the reputed computations where they are made; that they are tied down to the very county where things are transacted; hence where an *habere facias possessionem* is directed to the sheriff to put a man in possession of twenty acres, he must deliver twenty acres to him, according to the usage of the district where the lands lie. (See *Thynn v. Thynn*, 1 Vent. 51; S. C. 1 Lev. 27; 1 Sid. 190; 1 Mod. 190, 239; 2 Inst. 42.)

On behalf of the defendant it was argued that the quantity of land conveyed under the word acre could only be ascertained and determined by the statute *De Mensurandis Terris*, 34 Edw. 1. To adopt any other mode of computation, derivable from varying and local custom would lead to endless uncertainty, and a general want of precision on such questions; that there is a difference between a manor which is fixed to no certain measure and a quantity of acres where the measure is ascertained. It is true, if it was the custom of

* The word acre, on its first introduction, denoted not a determined quantity of land, but any open ground or field. It afterwards signified a measured portion of land, but the quantity varied, and was not fixed until the 33 Edw. 1, according to which an acre contains 160 square perches, so that every acre is a superficies of forty perches long and four broad, or in that proportion, be the length or breadth more or less. The length of the perch was, previously to the statute of Edward, fixed at five yards and a half, or sixteen feet and a half by the statute called *compositio ulnarum et perticarum*; and the act of Edward must of course be construed with reference to this standard. (See Co. Lit. 56; 4 Inst. 274; 6 Rep. 67, a; 4 Mod. 185; Cro. Eliz. 476.)

† In adverse suits the word acre is construed according to the statute measure, and not regulated by the measure of any particular or local custom. Thus in Andrew's case, cited Cro. Eliz. 476 it was adjudged, that if one brings an *ejectione firma*, or a *præcipe* of 100 acres, it shall be according to the statute measure; but if he bargains and sells 100 acres of land, that shall not be according to the statute measure, but according to the local mode of computation.

[164] the county or of the hundred, so as it was limited or fixed to a certain place, this method of computation might be good. But in the present case the acres, if taken by computation, are two-fifths larger than the common or statute measure, without confining such computation to any certain place; and that in all the cases wherein it is mentioned that a manor in reputation is to pass by a recovery, it is alleged in the deed that the covenantor is to suffer a recovery of a reputed manor, but it is not set forth in this deed that the covenantor was to suffer a common recovery of so many acres in reputation, but only of 140 acres generally. Besides, there is a difference between a fine levied, and a recovery suffered, in pursuance of a contract for a valuable consideration, and a voluntary fine and recovery, as this is; for in the one case the prior agreement governs the whole; but where there is no such agreement the ordinary course of law is to be the guide, and no strained construction ought to be deduced from the intention of the parties. And it is to be observed, that the statute *De Terris Mensurandis* was made on purpose to ascertain the fine due to the king by alienation of lands by fines, and therefore such a loose computation of the number of acres shall not avoid the design of this statute. *Per Cur.* It has been admitted by the defendant's counsel, that if the fine had been levied, and recovery suffered, in pursuance of a prior agreement or covenant for a valuable consideration, and if it had appeared to be the intent of the parties to pass the whole estate by the name of 140 acres, in such case the whole would pass. Now here the jury have found that the whole estate entailed was computed in the county to be 140 acres; and it will be difficult to comprehend a difference between a covenant for a valuable consideration and a voluntary covenant; for it cannot reasonably be said that the same words which pass all the lands in one case, shall not pass the whole in the other, especially when the tenant had it in his power to express his intention in any language he pleased.

Semb. Courts cannot control the quantity of land included in the word acre.

3. NOBLE V. DURELL, E. T. 1789, E. T. 3 T. R. 273.

Per Lord Kenyon. It is impossible to contend that a custom could prevail in a particular place; that a less number of days than seven should constitute a week; or that a less space of ground than an acre should be called an acre. See *Plow.* 169; 4 T. R. 414, 750; 6 T. R. 338; 11 East, 312; 4 Taunt. 102.

Act of Bankruptcy. See tit. Bankrupt.

Act of God.—See tit. Bailment; Carrier; Covenant; Condition; Contract.

[165] **Act of Parliament.**—See tit. Statute.

Actio non.—See tit. Plea.

Actio personalis moritur cum persona. See tit. Abatement, p. 1; and tit. Executor and Administrator.

Action.

I. OF THE PARTIES TO AN ACTION.—See tit. also Parties to Actions.

(A) BY AND AGAINST WHOM TO BE BROUGHT, WITH REFERENCE TO THE FORM OF ACTION OR SUBJECT MATTER.

See tit. Account,	Award,	Notes,	Creditors,
Action of,	Assault & Battery, Bond,		Contract,
Adultery,	Assumpsit,	Bottomry,	Contribution,
Adowson,	Bail Bond,	Bribery,	Copyhold,
Agistment,	Bailment,	Bye Law,	Copyright,
Agreement,	Bank of England,	Charter Party,	Covenant,
Annuity,	Bastardy Bond,	Church,	Damage Feasant,
Apprentice,	Bills of Exchange Common,		Defendant,
Arbitration and	and Promissory Composition with		Deceit,

Decey,	Freight,	Money had and re-	master,
Demurrage,	Game,	ceived,	Seduction,
Detinue,	Gaming,	Mortgage,	Ship and Shipping,
Distress,	Goods sold and de-	Naval Stores,	Simony,
Dower,	livered,	Nuisance,	Slander,
East India Com-	Guarantee,	Parent and Child,	Stamps,
pany,	Hue and Cry,	Parliament,	Stock,
Ejectment,	Husting,	Party Wall,	Taxes,
Elections,	Insurance, Marine,	Patent,	Tithes,
Escape,	do. on Lives,	Penal Statute,	Tolls,
Excise,	do on Fire,	Perjury,	Trade,
Execution,	Interest,	Peer,	Trespass;
Extortion,	Judgment,	Physician,	Trover,
Fairs and Markets,	Judicial Process,	Post Horse Act,	Turnpikes,
False imprisonment,	Landlord and Te-	Post Office,	Vicar & Vicarage,
False Returns,	nent,	Prize and Prize	Universities,
Farrier,	Legacy,	Money,	Use & Occupation,
Fences,	Libel,	Reward,	Usury,
Ferry,	Lien,	Replevin,	Wager,
Fish and Fishery,	Malicious Arrest,	Right, Writ of,	Warrants,
Fixtures,	Malicious Prosecu-	Sale, Bill of,	Waste.
Forcible Entry,	tion,	Salvage,	Watercourse,
Franchises,	Money lent,	School and School-	Way.
Frauds, Statute of	Money paid,		

(B) BY AND AGAINST WHOM TO BE BROUGHT WITH REFERENCE TO THE PARTICULAR CHARACTER OR CAPACITY OF THE PARTY.

See tit. Adminis-	Churchwarden,	Judge,	Principal & Surety,
trator,	Colonel,	Justice of the Peace	Printer,
Alien,	Constable,	Lunatic,	<i>Prochein Amy,</i>
Ambassador,	Coroner,	Master & Servant,	Proctor,
Apothecary,	Corporation,	Overseer of the	Receiver-General,
Attorney,	Dean and Chapter,	Poor,	Sheriff,
Auction and Auc-	Denizen,	Papist,	Slave,
tioneer,	Executor and Ad-	Partners and Part-	South Sea Company
Bail,	ministrators,	nership,	Surgeon,
Bankrupt,	Guardian,	Pauper,	Trustee,
Baron and Feme,	Hundred,	Pawnbroker,	Wharfinger,
Bishop,	Infant,	Peer,	Witness,
Carrier,	Innkeeper,	Pilot,	West India Com-
	Insolvent Debtor,	Principal & Agent,	pany.

II. OF THE REMEDY BY ACTION.

(A) REMEDY FOR INJURIES TO REAL PROPERTY CORPOREAL.

See tit. Assize,	Ejectment,	Formedon, Writ of,	Nuisance,
Writ of,	Entry, Writ of,	Gleaning,	Trespass,
Dilapidation,	Fixtures,	Mesne Profits,	Waste.
Dower,	Forcible Entry,	Right, Writ of,	

(B) REMEDY FOR INJURIES TO REAL PROPERTY INCORPOREAL.

See tit. Annuities,	Fairs,	Offices,	Tithes,
Common,	Franchises,	Pew,	Tolls,
Dignities,	Fishery,	<i>Quare Impedit,</i>	Watercourse,
Distress,	Heriot,	Rent,	Way.
Easement,	Market,	River,	

(C) REMEDY FOR INJURIES TO PERSONAL PROPERTY.

See tit. Accident,	Bailment,	Copyright,	Distress,
Animals, Injuries,	Cemetery,	Custom House Of-	Decoy,
to and by,	Coneys,	ficer,	Driving, Action for
Bankrupt,	Carriers,	Detinue,	Negligently,

[168]	Entry, Execution, Executor and Ad- ministrato Extent, Farrier, Fences, Fixtures,	Heir, Heriot, Ad-Hundred, Innkeeper, Justice of the Peace. Landlord and Ten- ant,	Mill, Partners & Part- nership, Patent, Pardon, Principal & Surety, Printer, Pew,	Replvin, Reservoirs, River, Sheriff, Ship and Shipping, Tombs, Trespass, Trover.
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(D) REMEDY FOR BREACH OF AN EXPRESS, OR IMPLIED CONTRACT.

See tit. Abstract, Account, Action of Accounting, Ac- tion for not Agistment, Agreement, Amnesty, Apprentice, Annuity. Arbitration and A- ward, Assumpsit, Attorney, Auction and Auc- tioneer, Bail, Bailment, Bail-bond, Bankrupt, Bargain and Sale, Baron and Feme, Bastardy Bond, Bond, Broker, Bye-law, Banker, Bank of England, Bank-notes, Barrister, Benefit Club, or	Society, Bills of Exchange and Promissory Notes, Bill of Lading, Bottomry, Bricks, Carrier, Charter-party, Check, Club, Liability of, Members of Colonial, Composition with Creditors, Condition, Consistory Court Contract, Contribution, Copyright, Costs, Covenant, Debt, Debtor & Creditor, Deceit, Detinue, Demurrage, Escape, Exchange, Executor and Ad-	ministrato Freight, Farrier, Fixtures, Frauds, Statute of Gaming, Gift, Goods bargained and sold, Goods sold and de- livered, Guarantee, Heir, Hustings, Herald, Innkeeper, Insurance, Interest, Joint Stock Com- panies, Judgment, Landlord and Ten- ant, Lease, Legacy, Lottery, Marriage, Promise of, Mortgage, Officer,	Overseer of the Poor, Partner and Part- nership, Party-wall, Patent, Post Office, Principal & Surety, Printer, Physician, Prize, Property Tax, Rent, Reward, Salvage, School & School- master, Ship and Shipping, Simony, Smuggling, Stamp, Stock, Sunday, Surgeon, Theatre. Use and Occupa- tion, Usury, Vendor and Pur- chaser,
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(E) REMEDY FOR INJURY TO PERSONS INDIVIDUALLY.

[169]	See tit. Assault & Battery, Advertisement, Constable, Carrier, Driving, Action for Negligently, Execution,	Executor and Ad- ministrato Highway, Imprisonment, Innkeeper, Justice of the Peace Libel,	Malicious Arrest, Malicious Prosecu- tion, Nuisance, Overseer of the Poor, Partner and Part- nership,	Perjury, Physician, School and School- master, Sheriff, Slander, Surgeon,
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(F) REMEDY FOR INJURIES TO PERSONS RELATIVELY.

See tit. Adultery, Baron and Feme, Highway,	Imprisonment, Master & Servant, Nuisance,	Overseer of Poor, Parent and Child, Seduction, Trespass.	School and School- master, Surgeon, [master,
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(G) REMEDY FOR RECOVERING PENALTIES ON PENAL STATUTES.

See tit. Apprentices, Bribery, Bye-laws, Bricks, Caricature,	Compounding Pro- secutions on Pe- nal Actions, Copyright, Dancing,	Debt, Election, Gaming, Gaoler, Hair Powder.	Joint Stock Com- panies, Leather, Lord's Act, Lottery,
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Madhouse, Overseers of the Poor, Penal Statute, Pilot,	Naval Stores, Navigation Act, Non-resident, Post Horse Act,	Prize, Qui tam Actions, Simony, Stamps,	Stock, Sunday, Theatre, Usury.
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III. OF THE FORM OF ACTION.

- (A) **WHETHER REAL OR PERSONAL**, p. 170.
- (B) **WHETHER ASSUMPSIT OR ACCOUNT**.—See title Account, Action of, p. 159.
- (C) **WHETHER CONTRACT OR TORT**, p. 170.
- (D) **WHETHER ASSUMPSIT OR COVENANT**, p. 174.
- (E) **WHETHER ASSUMPSIT OR DEBT**, p. 179.
- (F) **WHETHER DEBT OR COVENANT**.—See tit. Covenant; Debt.
- (G) **WHETHER REPLEVIN OR DETINUE**.—See tit. Detinue; Replevin; Trover.
- (H) **WHETHER TRESPASS OR CASE**.
 - (a) General rule, p. 181.
 - (b) Injuries to real property, p. 182.
 - (c) Injuries to personal property, p. 187.
 - (d) Injuries to the person, p. 194.
 - (e) Injuries to relative rights, p. 196.
 - (f) Injuries occasioned by persons in defendant's employ, p. 197.
- (I) **ESTABLISHED FORMS OF ACTION TO BE OBSERVED**, p. 198.

IV. OF JOINING DISTINCT AND DIFFERENT CAUSES OF ACTION.—See tit. Joinder. [170]

V. OF JOINING DISTINCT AND DIFFERENT RIGHTS AND INTERESTS.—See tit. Bankrupt; Baron and Feme; Executor and Administrator; Joinder; Partner.

VI. OF CIRCUITY OF ACTION, p. 199.

VII. SPLITTING ACTIONS, p. 200.

VIII. OF BRINGING TWO ACTIONS FOR THE SAME CAUSE—See tit. Consolidating Actions.

IX. OF CROSS ACTIONS.—See tit. Cross Action.

X. OF A FORMER RECOVERY OF THE SAME CAUSE.—See tit. Former Recovery.

XI. OF NOTICE OF ACTION.—See tit. Action, Notice of, p. 208.

XII. OF BRINGING AN ACTION BEFORE THE RIGHT TO SUE HAS LEGALLY ACCRUED, p. 202.

III. OF THE FORM OF ACTION.

1. WHETHER REAL OR PERSONAL.*

Per Cur. A replevin, it is said, is to be considered either as a real or personal action, according as the defendant shall happen to avow; this is laid down in Finch's Law, §16. but we think it a distinction that will appear, on examination, to be without foundation. For an action is either real or personal, according as the thing to be recovered by that action is either real or personal; and as nothing that is real can be recovered by an action of replevin, be the recovery what it will, it cannot be considered as a real action. and not on If the nature of the defence would make a difference, actions of trespass, wherein the title of the land is brought in question by the plea, and actions of debt for rent, wherein the title of the land may come in question, nay, even actions of debt on a bond, against an heir, where *riens per descent* is pleaded, must be considered as real actions, which yet would be most absurd. See *sonal action*

* Actions are divided into real, personal, and mixed. Real actions are those brought for the specific recovery of lands, tenements or hereditaments. Personal, are those brought for the specific recovery of goods and chattels, or for damages, or other redress, for breach of contract, or other injuries, of whatever description—the specific recovery of lands, tenements, and hereditaments, only excepted. Mixed, are such as appertain in some degree to both are properly reducible to neither of them, being brought both for specific recovery of lands, tenements, or hereditaments, and for damages for injury sustained in respect of such property.

Where the breach of an express contract amounts to a tort, the party injured may at his election bring either *assumpsit* or *tres pass.*

[171] Hence obstructing the plaintiff in landing his goods on a wharf, contrary to an agreement, may be declared on as in tort;

Or where there is an express or implied contract, the tort may be waived, and the plaintiff may proceed on the former;

[172]

As where money is paid to over-seers of a parish under an order which is afterwards quashed.

(C) WHETHER CONTRACT OR TORT.

1. DICKSON v. CLIFTON. M. T. 1766. C. P. 2 Wils. 321.

Per Cur. If a shepherd be entrusted with sheep, and he puts his own dog among them, which occasions damage, this would be a tort, although there may have been an express contract with him to take care of the sheep; and he might be charged upon the contract, or as wrong-doer.

2. MAST V. GOODSON M. T. 1792. C. P. 3 Wils. 348; S. C. 2 Bl. 848.

In this case the plaintiff declared, in the first count, that the defendant did, by himself and servants, wrongfully and injuriously obstruct and hinder the plaintiff from landing divers large quantities of his goods upon a wharf, contrary to a written agreement between him and the plaintiff. The second was in trover for coals and other goods detained by the plaintiff. On not guilty pleaded, and issue joined thereon, the jury found a general verdict for the plaintiff, with 48*l.* damages; and it was moved to arrest the judgment, on the ground contrary to that the damages were joint, and that case and trover could not be joined in one declaration. By the Court. This is certainly a misfeasance, and sounds wholly in tort force and wrong, and not in contract; for the agreement or contract executed both by the plaintiff and the defendant, is only introductory to show the tort or wrong done by the defendant to the plaintiff in hindering him from the benefit of his easement which he had an undoubted right to enjoy; therefore we are all clearly of opinion that the first count in the declaration under review is founded upon tort, and not upon contract, and that trover may be well joined with it.—Judgment for the plaintiff.

3. LAMINE V. DORRELL. M. T. 1704. K. B. 2 Ld. Raym. 1216. S. P.

HOWARD V. WOOD. H. T. 1677. K. B. 2 Lev. 245.

In an action of *indebitatus assumpsit* for money had and received to the use of the plaintiff as administrator of J. S., plea *non assumpsit*. It appeared on the trial that J. S. had died intestate, possessed of several Irish debentures; and the defendant, pretending to be entitled to be administrator, obtained letters of administration, and acquired possession of the debentures, and disposed of them. The defendant's letters of administration were afterwards repealed, and letters subsequently granted to the plaintiff, who brought the present action for the recovery of the sum for which the debentures had been sold. It was contended at the trial that the action could not be sustained in the present form, the defendant having sold the debentures as one claiming a title and interest in them, and could not therefore be charged as having received the money for the use of the plaintiff, when he received it for his own use. The remedy ought to have been trover or detinue. The point was reserved, and afterwards moved.

Sed Per Cur. It is clear that the plaintiff might have maintained detinue or trover for the debentures; and although it is sometimes difficult to convert acts of a tortious nature into a contract, yet in this case the plaintiff may well dispense with the wrong, and bring an action for the proceeds of these securities. Should an action of trover be afterwards brought, the judgment on the *indebitatus assumpsit* may be pleaded in bar, as it would be good evidence under the plea of not guilty, because by instituting this action, the plaintiff has ratified and confirmed the sale, and admitted it to be no conversion.

On the principal point, see 2 Mod. 260; 8 Wils. 309; 2 Bl. Rep. 427; 1 T. R. 62. 403; 2 T. R. 145; 4 T. R. 211; 6 T. R. 681; 1 Taunt. 112; 1 Stark. 134; 10 East, 378, 418; 16 id. 130; 3 M. & S. 191.

4. FELTHAM V. TERRY. E. T. 1772. K. B. Lofft. Rep. 209; S. C. Bul. N. P. 131. cited in Cowp. 419. and 1 T. R. 387.

Where an action for money had and received was brought against an overseer of the poor, to recover money in his hands which had been levied by a sale of the plaintiff's goods on a conviction, which was afterwards quashed, the Court held, that the action was maintainable for the money produced by the

sale of goods, for the plaintiff might waive the *tort*, and sue for the money really due. See *Irving v. Wilson*, 4 T. R. 485.

5. *LINDON v. HOOPER*, H. T. 1775, K. B. Cowp. 414.

Where the defendant had taken and impounded the plaintiff's cattle as damage feasant, the plaintiff claimed a right of common but paid the money charged for the damage, and then brought *assumpsit* for money had and received to recover it back, for the purpose of trying the right. The action was adjudged not to lie; 1st. Because that upon the general issue of non *assumpsit*, the defendant would not be apprized of the point to which to apply his defence; and 2dly. That the claim of a right of common could not be decided, for it would not appear afterwards on the face of the record. The action should have been trespass or replevin, in which that right would come directly in question, and appear on the face of the pleadings.* See 6 T. R. 298; 1 M. & S. 609.

6. *LIGHTLY v. CLOUSTON*, H. T. 1803, C. P. 1 Taunt. 112. *S. P. FOSTER v. STEWART*, M. T. 1814, K. B. 3 M. & S. 191.

This was an action of *indebitatus assumpsit* for work and labour of the plaintiff's apprentice. On the trial it appeared the defendant had seduced the apprentice from the plaintiff's ship, and had employed him in navigating his own. It was objected that the action was misconceived, as it ought to have been in *tort*. *Sed Per Cur.* It has long been settled that in cases of sales the plaintiff may sue for the produce and abandon the *tort*; the present case is within that rule, and must be decided upon analogous principles; for although the defendant has wrongfully acquired the labour of the apprentice, the master may waive his right to recover damages for the *tort*; and may say that he is entitled to the value of his labour. See *Eades v. Vanderput*, 5 East, 39, n; Cowp. 419; Bul. N. P. 133; 2 Bl. Rep. 827; 2 T. R. 144; 2 M. & S. 915, 1239.

7. *THE HUDDERSFIELD CANAL COMPANY v. BUCKLEY*, M. T. 1796, K. B. 7 T. R. 36.

In an action on the case in *tort* for calls under the 74th section of the Huddersfield Canal Act (34 Geo. 3, c. 53,) which empowers the committee to make calls for money on the proprietors, and directs the owners of shares to pay, &c. and adds that "if any person shall neglect to pay the proportionable share of the money to be called for by the first call, &c. it shall be lawful for the company to sue for and recover the same in any of his majesty's courts of record by action of debt or on the case, and if any person shall neglect to pay his proportionable share of the money, to be called for after the first call, he shall forfeit 5l. on every share." On a special case it was argued, that the form of action had been misconceived, it being brought for a mere breach of contract in not paying a sum of money; the remedy ought either to have been an action of *assumpsit* or debt; that the words in the statute, "action on the case," must be understood according to the subject matter to which they are applied; and being applied here to the case of a breach of contract, they must be understood to mean "an action on the case on *assumpsit*." For to construe them differently would be to deprive the defendant of his benefit of a set-off. But the Court overruled the objection, being clearly of opinion that the action was properly brought, the act having in express terms authorised the company to sue by an action on the case. See the *King v. Marsock*, 6 T. R. 771; *Esp. Penal Actions*, 318; 1 Chit. Pl. 135, 3d Edit.

8. *HILL v. PERROTT*, M. T. 1810, C. P. 3 Taunt. 274.

In action for goods sold, it was proved that a considerable quantity had been selected to be delivered to one D. The defendant undertaking to accept a bill for the amount to be endorsed by D. the goods were accordingly delivered, but the defendant obtained possession of them. It was clearly proved that the whole transaction was fraudulent, D. having been made the

* Lord Mansfield observed, that the particular circumstance of a promise or agreement, to return the money if the plaintiff should make out his right, did not distinguish the case from the general question.

session of
them him
self.

But where
goods are
sold 'with
out re-
course on
the buyer
in case of
non-pay-
ment," for
a bill which
the vendee
knows to
be worth
nothing,
the vendor
cannot
maintain
assumpsit
for the val-
ue of the
goods, but
must sue in
tort.

[174]
In case of
deceit not
apparent
on the face
of a writ-
ten con-
tract, the
remedy
should be
in tort for
a fraudu-
lent repre-
sentation,
and not as
assumpsit.
Where a
party has a
contract un-
der seal,
he must
sue thereon
in debt or
covenant,
and cannot
maintain an
action of as-
sumpsit.
Even tho'
the debtor
after mak-
ing the
contract,
expressly
promised
to perform
it;

mere instrument of the defendant. The jury found a verdict for the plaintiff, and on motion to set it aside, it was said, *Per Cur.* The settled principle of law, that no man can take advantage of his own fraud, applies strongly to this case; for it has been proved in evidence that the property was in the possession of the plaintiff, and afterwards in the possession of the defendant, and for this transmutation no account can be given, without the fraud itself being made the ground of defence. The rule to set aside the verdict must be refused.

9. READ v. HUTCHINSON, H. T. 1813, N. P. 3 Campb. 352.

Actions for goods sold. In the sale note it was stipulated that the goods should be paid for by a bill on A. B. "without recourse on the buyer in case of its not being paid." It was proved that at the time of the sale, although the defendant had represented the bill to be a good one, he was aware that it was absolutely valueless. *Per Lord Ellenborough, C. J.* The vendor cannot maintain assumpsit for the price of these goods; he should have sued in tort for the deceptive representation. It is provided by the express stipulation of the contract, that the buyer should not be liable on the dishonour of the bill. Plaintiff nonsuited. See 6 Mod. 146; S. C. Holt, 121; 2 Taunt. 274; 1 Stark. 20; 1 Campb. 4; 2 Lord Raym. 928; 7 Taunt. 312; 3 M. & S. 362.

10. MEYER v. EVERTH, E. T. 1814, N. P. 4 Campb. 22.

Declaration in assumpsit for a breach of warranty, that the goods sold should be equal to sample. On the bought note being produced, it appeared that no stipulation had been inserted that the bulk should accord with the sample; for this variance it was contended that the plaintiff must be nonsuited. On the other side it was submitted, that if it could be shown that a fraud had been committed by the defendant having exhibited a sample at the time of the sale different from the one afterwards sent to the plaintiff, it would be sufficient to support the declaration. *Sed per Lord Ellenborough, C. J.* The plaintiff should have declared in tort, for a deceitful representation, and not on a contract, which does not contain the stipulation on which the breach is assigned. See *Pickering v. Dawson*, 4 Taunt. 779; *Pomell v. Edmunds*, 12 East, 11.

(D) WHETHER ASSUMPSIT OR COVENANT.

1. BULSTRODE v. GILBURN, H. T. 1735, K. B. 2 Stra. 1027.

In an action of assumpsit for money had and received, it appeared that the defendant had entered into articles of agreement under seal, wherein he had covenanted to account to the plaintiff for a specified portion of certain fees. Lord Hardwicke considered the action not maintainable; the plaintiff having a covenant under hand and seal, which gave him a remedy of a higher nature; and upon that point nonsuited the plaintiff. See 1 Rol. Ab. 11, 517; 1 Vin. Ab. 278, pl. 20; 1 Leon. 293; Cro. Jac. 506, 598; Bul. N. P. 128; 1 Selw. N. P. 443, n. et. infra.

2. ANONYMOUS, T. T. 1774, K. B. Cowp. 128.

The plaintiff had sued out execution against the defendant upon a judgment which he had obtained in a former action; and the defendant, in consideration that the plaintiff would stay the execution, promised to pay the debt and costs, upon which promise the plaintiff brought the present action. But the Court said it was an attempt to turn a judgment debt into a simple contract. The promise is, to pay a debt to which he was before liable upon record, for by the judgment he is liable to the costs as well as the debt, and the promise is no waiver or extinguishment of the judgment debt, which is still a lien upon the land; therefore such a promise is no ground upon which to raise an assumpsit, though the rule would be otherwise if the promise had

* In *Tempest v. Ord*, 1 Mad. 89. the Vice Chancellor said, when a bill of exchange is given in payment of a debt, and the bill is not paid, the creditor, unless he has purchased the bill out and out, has a right to re-ort to his original cause of action. So if, before a bill becomes due, and is dishonoured, the creditor may resort to his original debt.

† *Semb.*, or in assumpsit.—See *Doug.* 21; 4 Campb. 22; *id.* 144; 2 Eam. 446; 1 Chit. 140. 2d ed.

been made by a third person. *Sed qu.* *Tanner v. Hague*, 7 T. R. 420; and 2 B. & P. 440; 2 East, 243; and post, tit. Execution; and 1 M. & S. 573; 3 Campb. 549. n. a.

3. *BARBER v. FOX*, M. T. 1673, K. B. 1 Vent. 159. *S. P. HUNT v. SWAIN* E. T. 1664. K. B. T. Raym. 127. [175]

The plaintiff declared that the defendant's ancestor being bound to him in a certain sum, the defendant, as his heir, promised, in consideration of his forbearing to sue him for a given time, to pay the debt. Plea, *non assumpsit*. Verdict for plaintiff. It was moved, in arrest of judgment, that it did not appear from the declaration that there was any cause of action against the heir; for as it was not alleged that the ancestor had bound his heir by the obligation, there was no legal right of suit upon which the promises to forbear could operate. *Per Cur.* After verdict it might be intended that there was originally a sufficient cause of action, if the contrary did not now appear from the plaintiff's own showing; but, in this case, he has expressly admitted in his own declaration that the ancestor was alone bound. See *Cro. Car.* 343; *Cro. Eliz.* 67; 1 Leon. 293; *Com. Dig.* Action, Assumpsit, B. 1; 1 Saund. 210. n; 2 Saund. 137. b; *Hard.* 74; 1 Leon. 293; 1 Lev. 188; 12 Mod. 511; 8 T. R. 595; 1 East. 104; 2 M. & S. 309; 1 Vin. Ab. 272; 1 Rol. Ab. 8 pl. 6; *Bac. Ab.* Assumpsit, A; post, tit. Executor and Administrator; Forbearance; Guarantee; Heir.

4. *SUTHERLAND v. LISHNAN*, M. T. 1799, C. P. 3 Esp. N. P. 42.

In an action of assumpsit for sailors' wages, it was objected that the defendant had signed articles under seal, but which, on being produced, appeared to have been executed by the plaintiff under seal, but not by the defendant. *Per Lord Eldon.* The defendant never having sealed the articles he could not be sued in covenant; the present action is rightly brought.

5. *WHITE v. CUYLER*, H. T. 1795, K. B. 6 T. R. 176; S. C. 1 Esp. N. P. C. 200.

By articles of agreement under seal between the defendant's wife and I. of the one part, and the plaintiff, of the other part; the defendant's wife agreed to take the plaintiff with her abroad as a servant, pay her certain wages as long as she continued in her service, and the expences of her passage home to England, in case of dismissal. The defendant's wife not having paid the plaintiff's passage home from abroad, brought an action of assumpsit against the defendant. The defendant objected that the action was misconceived, for that the plaintiff should have sued upon the deed. But the Court were of opinion that the action was well brought. The covenant by the wife could not bind the husband, she having no authority to bind him by deed.

6. *SCURFIELD v. GOWLAND*, H. T. 1805, K. B. 6 East. 241; S. C. 2 Smith, 332. *S. P. WATERS v. MANSELL*, T. T. 1820, C. P. 3 Taunt. 56.

A deed, a bond, and warrant of attorney, (upon which judgment had been entered,) had been given for securing an annuity; and on the application of the grantor to the Court of King's Bench, the judgment was set aside, and the warrant of attorney directed to be delivered up to be cancelled, because the latter instrument was improperly described in the memorial, but no order was made as to the deed or bond which remained uncanceled. *Per Cur.* The collateral grantee is entitled to recover back the consideration in an action for money had and received; he had contracted for one entire assurance, consisting of several securities, and has a right to have the assurance entire, or to have back his money; and the defendant having taken away one of the securities, the consideration for which the money was paid has failed. See post, tit. Annuity; Money had and received; and *Shove v. Webb*, 1 T. R. 732; *Kerrison v. Cole*, H. T. 1807, K. B. 8 East, 231.

7. *NURSE v. CRAIG*, H. T. 1806, C. P. 2 N. R. 148.

Husband and wife having agreed to separate, a deed of separation was executed between husband, on the first part; his wife, on the second part; and a trustee, the sister of his wife, on the third part; wherein the husband covenanted with the trustee to pay the wife, during the separation, a weekly al-

Unless in respect for a new consideration creating a new contract; as when an heir, in consideration of forbearance, promises to pay the debt of his ancestor;

Or if the deed be only executed by the plaintiff, and not by the defendant, the action should be *assumpsit*;

Or if the deed be void as where a *feme covert* has, without authority from her husband, contracted with a servant by deed, the latter must sue the master in *assumpsit*.

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Or where the deed and other securities are declared invalid under the act; or there is a paramount common law obligation,

where, on the separation of husband and wife, he covenanted by deed with a trustee to pay an allowance, for her separate maintenance but made default, and the trustee provided the wife with necessities;

allowance, which she agreed to accept in full satisfaction of her maintenance, provided, that if the husband should pay any debt which his wife, during the separation and payment of the annuity, should contract, it should be lawful for him to withhold payment of the weekly allowance until he should be reimbursed; the wife, upon the separation, went to live with the trustee, who supplied her with necessities; the husband having failed to pay the weekly allowance, the trustee brought an action of *indebitatus assumpsit* against him for the amount of the necessities. *Per* Chambre, Rooke, and Heath, Justices. Although the trustee had another remedy, and might have brought an action on the deed, yet assumpsit is maintainable, on the ground that there is a common law obligation on the husband to provide necessities for his wife, although she lived apart from him. Where the law imposes a duty it raises a promise on the part of the person on whom it was imposed to discharge it; and the mere covenant, without payment, is not sufficient to exempt the husband from this liability. Sir J. Mansfield, C. J. observed, that a general provision for the separate maintenance of the wife, whether the husband paid it or not, deprived the wife of the advantages of the common law, and prevented the husband from being sued either in assumpsit or debt for necessities furnished to his wife.

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Or where parties who have by deed covenanted to account each other, and to pay over what shall appear to be due; if they state an account, and one expressly promise to pay the balance, as assumpsit may be supported notwithstanding the deed;

8. *FOSTER v. ALLANSON*, E. T. 1788, K. B. 2 T. R. 479. S. P. *MORAVIA v. LEVY*, 1786. At Guildhall. Cor. Buller, J. Cited 2 T. R. 483. n.

Articles of co-partnership had been entered into between the plaintiff and defendant for seven years, in which there was a covenant to account yearly, and to adjust the accounts and make a final settlement at the expiration of the partnership, when the stock and profits were to be divided, and general leases given. In the second year of the partnership it was agreed between them, that the defendant should carry on the business alone; and they came to a settlement of accounts, in which several items were included not relating to the partnership funds; and the balance being found in favour of the plaintiff, the defendant promised to pay it, and the plaintiff, upon that promise, brought an assumpsit. It was objected that the proper form of action for the plaintiff in this case was covenant, and not assumpsit. But, *Per Cur.* Assumpsit will lie. In this case the account was not confined to matters relating to the partnership, but included other matters for which the covenant could not be supported; therefore, when the defendant promised to pay the balance, there was an end of the covenant. But even if no other articles had been introduced into the account but those relating to the partnership, yet assumpsit might be sustained; for the question then would be, whether a previous partnership being dissolved, and an account settled, is, or is not, in point of law, a sufficient consideration for a promise? And there can be no doubt but it is.

See *Schaek v. Anthony*, 1 M. & S. 573; *Gow on Partnership*, 97, 99.

Or where the terms of a contract under seal are varied by a simple contract, the remedy on the substituted agreement is assumpsit and not covenant.

9. *HEARD v. WADHAM*, T. T. 1801, K. B. 1 East, 619, S. P. *STURDY v. ARNAULD*, E. T. 1790, K. B. 3 T. R. 599.

Declaration in covenant, alleging that A. had covenanted that he would, on or before a certain day, convey to B. by such assurances as counsel should advise, all the ground before conveyed to him by C; that in consideration thereof B. covenanted to pay certain reserved rents to A. and to lay out and expend a specified sum of money on the premises. The declaration then stated, that after the premises were conveyed and accepted by B. it was agreed that B. should accept a conveyance of certain ground rents, in lieu and substitution of part of the land. Breach, that although he had conveyed the substituted property, and B. had accepted the same, yet that B. had not paid the residue of the rents reserved, or laid out the stipulated sum in repairs.

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On a demurrer to the replication it was contended, that as the original covenant under seal had been abandoned, and was admitted on the record to have been qualified or partially relinquished, the remedy on the simple substituted contract, varying the terms of the covenant must be the subject of an action of assumpsit, and not of covenant. *Per Cur.* It is impossible for the plaintiff to answer the objection made to his recovery in the present form of action. The parties, it is admitted, entered into a subsequent agreement, by parol, to do a

different thing than that which the original covenant required; and the plaintiff attempts to maintain an action on the former contract, by proving the performance of the substituted agreement, and not the fulfilment of the stipulations in the previous contract. The contract, however, which has been substituted for the covenant may properly be made the subject of an action of assumpsit, but it never can be argued that it can be made the foundation of an action upon a covenant under seal. See 2 Com. Dig. 342. L. 2; Rawlins v. Vincent, Carth. 124; Browne v. Goodman, cited in Littles v. Holland, 3 T. R. 592; and 7 T. R. 381; 10 East, 295; 1 N. R. 240.

10. CROFTS v. TRITTON. T. T. 1818. C. P. 2 B. Moore, 411.

Action of assumpsit for money paid, &c. On the trial it appeared in evidence, that the plaintiff's brother had mortgaged an estate, and that the plaintiff had become surety with a joint bond for the sum advanced, and that A. afterwards, without the plaintiff's knowledge, had sold the estate to D. who had covenanted to pay the mortgage principal money then due, and to indemnify plaintiff and his brother from the payment thereof; but being called upon by the mortgagee to discharge the mortgage, and being unable to advance the requisite sum, the plaintiff had paid the amount, and commenced the present action for its recovery. For the defendant it was objected, that this action could not be maintained; and that if the plaintiff had any remedy, he should have sued in covenant, because, in the deed entered into between the defendant and the plaintiff's brother, there was a covenant from the former to the latter, for indemnifying both him and the plaintiff against the bond and mortgage deed. The judge accordingly nonsuited the plaintiff with leave to move. A rule nisi was obtained; and on showing cause the same arguments were advanced as at the trial. But in support of the rule it was contended, that the plaintiff, by commencing this action, had adopted the most convenient and direct course; the legal obstacle suggested against his recovery, that a remedy of a higher nature was in existence between the parties, by which the plaintiff is precluded from recovery in an action for money paid, could not avail the defendant, for if his brother had paid the money, there could have been no doubt, as he would have been entitled to recover the money from the defendant under the deed of indemnity; or if the plaintiff himself had been a party to that deed, all difficulties would have been removed. But the rule that a security of a higher nature is in the plaintiff's possession, cannot apply in this case he being a party to the deed. *Per Cur.* The defendant is only bound by the specific obligation to indemnify the plaintiff and his brother; the present action cannot be sustained, the plaintiff being clearly confined to his remedy on the covenant. See 3 T. R. 377; 8 T. R. 310.

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(E) WHETHER ASSUMPSIT OR DEBT.

1. JOHNSON v. MAY. M. T. 1682. C. P. 3 Lev. 150; S. P. MASON v. BELDHAM, M. T. 1684. K. B. 3 Mod. 73.

Assumpsit, in consideration that the defendant had surrendered a copyhold estate to the plaintiff, and that the plaintiff had agreed to permit him to enjoy it from the 10th August, &c. to the 1st May following; he promised to pay the plaintiff 50*l.* The defendant demurred, for that a term had been created and a rent for which debt lies, and not assumpsit. But adjudged *Per tot. Cur.* (after taking time to consider) that the action lies, for this shall be intended express promise, and not promise in law arising upon the contract; and if assumpsit had been pleaded, instead of demurring to it, the plaintiff must have proved an express promise, which being collateral and *quasi*, a special agreement to pay the rent, and of the same effect as an express covenant in a deed. See 1 Rol. Ab. 7; Cro. Car. 343; 2 Lev. 204; 1 Sid. 279; Cro. Eliz. 118; Cro. Jac. 598; Lil. Rep. 68; Cro. Eliz. 859; Freem. 234; 2 Doug. 729; Co. Lit. 47. b. 83. a. n. 4; 3 Wooddes. 152-3.

* This act directs, that it shall be lawful for landlords when the agreement is not by deed to recover a reasonable satisfaction for the lands, tenements or hereditaments held or occupied by the defendant in an action on the case, for the use and occupation of what was so held or enjoyed: and if in evidence on the trial of such action any parcel demise, or any agreement (not being by deed), whereon a certain rent was reserved, shall appear,

2. MASON v. WELLAND. M. T. 1684. K. B. Skin. 238.

Or unless the claim was founded merely on a quantum meruit.
 In an action on the case, the plaintiff declared, that, in consideration that he would permit the defendant to occupy land of the plaintiff's for one year, he would give him as much for it as it is worth. *Per Cur.* Where a thing savours of the realty, as where a thing certain is reserved, the law will not permit an action technically personal to be brought, but will restrain the party to his proper action, without confounding them; but here, if this action does not lie, the party would be without remedy, which the law will not permit, for an action of debt does not lie because it is uncertain,† and there can be no distress, because there is no rent, wherefore this action is well brought; and judgment was granted for the plaintiff *una voce*. See *Courtney v. Strong*, 1 Salk. 364; 6 Mod. 265; 2 Ld. Raym. 1217.

3. BELL v. BURROWS, F. T. 1764. C. P. cited Bul. N. P. 129. a.

Though a statute is considered to be a specialty yet assumpsit may be supported for money due under it. So upon a judgment in a foreign court:
 A private act of parliament gave power to commissioners to divide common fields, and to make such orders and regulations as they should think fit; they awarded that all proprietors of land allotted to them, which had been ploughed or manured since any corn had been reaped, should pay to the person who had manured or ploughed it 4s. an acre. General *indeb. assumpsit* lies for this. See *Cowp.* 474; *Doug.* 10. n. 2. 402, 407; *Com. Dig.* tit. Action upon Statute.

4. CRAWFORD v. WHITTAL, H. T. 1672. K. B. cited 1 Doug. 4. n. 1. S. P. SINCLAIR v. FRASER. 1771. cited in *Duchess of Kingston's case*, 11 Harg. St. Tr. 122; PLAISTOW v. VAN UXEM. 1772, cited 1 Doug. 4. n. 1.

This was an action for *indebitatus assumpsit* brought by Crawford, as administrator of one Hargrave, in which he declared that the defendant was indebted to him as administrator, in the sum of 747l. sterling, for 6904 rupees, 10 annas, and 9 pice, of current money of Bengal, in the East Indies, by a certain judgment of the Honourable the Mayor's Court at Calcutta, at Fort William in Bengal, holden before, &c. before that time, viz. on, &c. adjudged and awarded to be paid by the said defendant to the said plaintiff, as administrator, as aforesaid, for a certain demand of the said plaintiff, as administrator, as aforesaid, sued and prosecuted in the same court, of 5801 rupees, &c. together with the interest due thereon from &c. till, &c. at the rate of, &c. being &c. current money of Bengal, aforesaid, and costs of suit being, &c. making together the sum of 6904 rupees, &c. which said judgment is in force and unsatisfied, and which said 6904 rupees, &c. at the time of recovering said judgment were, and yet are, of the value of the said 747l.; and being so indebted, the defendant, afterwards in consideration of the premises, undertook to pay. There were other counts to the like effect, some of them stating the sum only in East India money, some varying the amount, and some stating the judgment without adding "for a certain demand," &c. *Per Ashurst, J.* I have never seen this doubted. I have often known assumpsit brought on judgments in foreign courts; the judgment is a sufficient consideration to support the implied promise. Judgment for the plaintiff. See 11 East, 124; 1 Campb. 63; *post*, tit. Judgments.

5. SMITH v. ALLPORT. T. T. 1801. C. P. 2 B. & P. 482.

Or upon an order of an inferior court of justice, if there be an express agreement to perform it.
 This was a special case, which stated, that a suit being pending in the Court of Chancery between the parties it had been mutually agreed between them that they should do certain acts connected with the process in that suit. That the agreement was afterwards made a rule of Court; and in pursuance thereof several orders of court were made with reference to the matter comprised in the agreement which the defendant had refused to obey. The question for the opinion of the court was, whether an action at law on the contract could be maintained. For the defendant it was argued that the agreement on which the action was brought being merely a proceeding in the course of a suit in Chancery,

[180] the plaintiff in such action shall not, therefore, be nonsuited, but may make use thereof as an evidence of the quantum of damages to be recovered. See *post*, tit. "Use and Occupation," and 6 T. R. 1282. 8 T. R. 327; 6 East, 348. 2 Taunt. 145; Willes, 711. 118; 2 Smith, 462.

† This distinction is abolished, and debt is now sustainable on a quantum meruit. See 1 H. Bl. 550, 12 Mod. 72; *Doug.* 6, 11 East, 62.

an infraction of it was rather a contempt of the court of equity than a proper object of a suit at law. *Sed Per Cur.* Though the rule is clear that in general an order of another court is not a ground of action, yet in the case before us the defendants have by the terms of their agreement raised a sufficient foundation to enable the plaintiff to maintain an action of assumpsit against them. See *Tremenhere v. Tresilian*, 1 Sid. 452; *Emerson v. Lashley*, 2 H. Bl. 248; *Carpenter v. Thornton*, 3 B. & A. 52; *Fry v. Malcolm*, 4 Taunt. 705; *Anon.*, Lofft. 305; *Chapman v. Pickersgill*, 2 Will. 146; *Sadler v. Robins*, 1 Campb. 253; *Moore v. the Bank of England*, 4 Bro. P. C. 287.

6. *COLLINS v. MATTHEW*, M. T. 1804, K. B. 5 East, 474.

On the argument of a demurrer to a plea to action of debt on a judgment recovered in the Court of Exchequer in Ireland, the Court expressed a clear opinion that since the union of that country with Great Britain, the judgments of the Irish courts are properly pleaded as records. See 1 Doug. 1, 5, 6.

(a) *General rule.*

1. *REYNOLDS v. CLARKE*, T. T. 1724, K. B. 2 Ld. Raym. 1399; S. C. 1 Stra. 634; S. C. 8 Mod. 272; Forts. 212. S. P. *HAWARD v. BANKES*, M. T. 1760, K. B. 2 Burr. 1113.

Trespass was brought for entering the plaintiff's yard and fixing a spout there; *per quod* the water came into the yard and did damage. The defendant justified that before the trespass J. F. was scised in fee of plaintiff's house and yard, and two other houses adjoining; and demised plaintiff's house and yard to one T. except the free use of the yard and privy for the tenants of the two other houses, jointly with the tenant of the plaintiff's house. The plea then showed how one of the other two houses came to the defendant, and that he entered the yard and fixed the spout for his necessary use to carry off the rain, *et bene licuit*. Demurrer to plea; for the defendant it was argued, that the exception amounted to a licence of the party, and therefore that an action of trespass would not lie; but, if the spout were a prejudice, the plaintiff must bring an action on the case. After an *ulterius concilium*, the Court gave judgment for the defendant, saying that they must keep up the boundaries of actions. If the act in the first instance be unlawful, trespass will lie; but if it be *prima facie* lawful, and the prejudice arising from the act be not immediate, but consequential, it must be case. The defendant having a right to enter the yard, and do the first act which is here complained of, trespass will not lie; for it is not pretended that the bare fixing the spout was the cause of action, without the falling of any water; therefore it should have been an action on the case. See 11 Hen. 4, c. 23; 2 Ed. 4, c. 4; 12 Ed. 4, c. 80; 13 Ed. 4, c. 10; 9 Hen. 7, c. 8; 19 Hen. 6, c. 34; 21 Hen. 6, c. 15; 40 Ed. 3, c. 10; Hob. 180; F. N. B. 217, 220. *Morgan v. Hughes*, 2 T. R. 231; *Day v. Evans*, 5 T. R. 649; *Ogle v. Barnes*, 8 T. R. 190-1; 1 Chit. Pl. 126; 1 Selw. N. P. 432.

2. *SAVIGNAC v. ROOME*, M. T. 1794, K. B. 6 T. R. 125.

The plaintiff declared in trespass on the case, that he being possessed of a certain horse and chaise, and the defendant having a coach and two horses under the direction of his servant, the latter wilfully drove against the plaintiff's chaise, &c. and damaged it, &c. Plea, not guilty. The plaintiff obtained a verdict. A motion was made in arrest of judgment, on the ground that even if any action could be supported at all for a wilful act of the servant, it should have been trespass, and not case; that the memorandum to the declaration described the action as being in the latter form, and the commencement was "for that whereas," which would be bad in trespass. In support of the declaration it was argued, that even admitting that the appropriate remedy was trespass, yet the omission of the technical words of *vi et armis* and *contra pacem*, usually introduced in declaration in that form of action, could not be taken advantage of in arrest of judgment, though they would constitute good grounds for a special demurrer. *Per Cur.* The whole frame and structure of the declaration clearly shows, that the present action is an action on the case. The memorandum states that it is an action of that description, when

But not on Irish judgments since the union.

Where an injury is occasioned by the act of the defendant at the time, or the defendant is the immediate cause of the injury, trespass *vi et armis* is the proper remedy; but where the injury is not direct and immediate, but consequential on the act done, then the remedy is by action on the case.

To support a verdict the Court will not change the form of action, and alter "trespass into case."

it ought strictly to have been trespass. This is as much a trespass as if the defendant had directed the servant to give the plaintiff a blow. The injury was obviously immediate, and falls within the rule laid down in *Day v. Edwards*, 5 T. R. 648. The judgment must consequently be arrested. Where an action in its inception is an action on the case, the plaintiff cannot afterwards convert it into an action of trespass, by means of the statute 16 & 17 Ch. 2. This act, though a highly beneficial one, was never intended to confound the boundaries of actions, and to enable the plaintiff after verdict to call his action either trespass or case, at pleasure. That act says, that if in an action of trespass, which the plaintiff describes in his declaration as an action of trespass, he happens to omit the words *vi et armis* or *contra pacem*, the want of these words shall not vitiate the declaration; but where the action itself is misconceived, the act of parliament was never intended to cure such an objection.

When the injury committed to land is immediate, and the land is in possession of the plaintiff, the remedy is trespass, but when it arises out of a nonfeasance, as for not carrying away tithes, it is case; [183] Or where the injury is not immediate but consequential; as for placing a spout near the plaintiff's land, so that the water afterwards ran thereon. *Semb.* Trespass lies for over flowing the plaintiff's land, tho' occasioned by an act on the defendant's own soil. For immediate injuries to exclusive rights, trespass *vi et armis* is the proper remedy.

Rule for arresting judgment absolute.
See 2 H. Bl. 242; 1 East, 106; 8 T. R. 188; 1 B. & P. 172; *Dyer*, 161; 3 T. R. 57; 2 Bl. Rep. 892; 3 Wils. 403; *Cro. Jac.* 488; 1 *Stra.* 621.

(b) *Injuries to real property.*—See tit. Nuisance.

1. *SHARPCOTT v. MUGFORD*, E. T. 1697, C. P. 1 *Ld. Raym.* 187.

This was an action on the case against the proprietor of tithes, for not taking the tithes off the plaintiff's land within a reasonable time after request, but on the contrary for suffering them to continue there for a long time, to wit, nine months; *per quod totum tempus prædictum*, the plaintiff lost the benefit of the land. The defendant pleaded not guilty.—Verdict for the plaintiff.

A motion was made in arrest of judgment on the ground that the action would not lie, as the plaintiff might have abated the nuisance, or might have distrained the tithes *damage feasant*, or should have brought an action of trespass. But the Court were of opinion that the remedy adopted was the most appropriate one the plaintiff could have pursued; for he could not have sustained trespass, *quare vi et armis*, as the non-removal of the corn was a mere nonfeasance, though it was admitted that where a party commits a direct injury to real property, as digging in pits, &c. trespass would lie. See 1 *Ld. Raym.* 188.

2. *REYNOLDS v. CLARKE*, T. T. 1721, K. B. *Stra.* 634; 2 *Ld. Raym.* 1399; 8 *Mod.* 272; *Forts.* 212.

Per Cur. If the occupier of a house, who has a right to have the rain fall from the eaves of it upon the land of another person, fixes a spout whereby the rain is discharged in a body upon the land, the proper form of action by the owner of the land against the occupier of the house for this injury is an action on the case; because the flowing of the water, which constitutes the injury, is not the immediate act of the occupier of the house, but the consequence only of his act, viz. the fixing the spout. See this case more fully abridged, *supra*, p. 181.

3. *COURTNEY v. COLLET*, H. T. K. B. *Ld. Raym.* 272; S. C. *Carth.* 436; S. C. 12 *Mod.* 164.

In trespass for breaking down wares, whereby the water overflowed the plaintiff's fishery, *per quod* the fish escaped, and the plaintiff and his servants prevented from fishing therein. Verdict for the plaintiff. On a motion in arrest of judgment it was contended that the action ought not to have been case.

Sed Per Cur. We are all of opinion that this was a plain trespass. The defendant has caused a superfluity of water to drown or overflow the land or fishery of the plaintiff; and the *per quod* the fish escaped, is but an aggravation of damages.

4. *WILSON v. MACKRETH*, H. T. 1766, K. B. 3 *Burr.* 1824.

In an action of trespass for entering the plaintiff's close, and digging and carrying away his turf and peat, upon the general issue pleaded there was a verdict for the plaintiff, subject to the opinion of the Court, whether the action was maintainable. It appeared in evidence upon the trial, that the plaintiff was seised in fee of a freehold tenement in the manor of Upper Stavely, in which manor there was a large waste, with divers large mosses thereon,

out of which turfs and peats were usually dug and that the plaintiff, and all those whose estate he had in the said tenement, had, time out of mind, had and used an exclusive right of digging turfs in a certain moss in the said waste, called Car Moss, marked and bounded out from the other tracts of moss in the said waste by certain meer stones. The objection was, that it ought to have been an action on the case; because the plaintiff had no right of ownership, either in the soil, or in the profits of the soil, but only a right to dig for turf. *Per Cur.* The plaintiff's right is in a several piece of ground, butted and bounded, a separate right of property to take the profit of the turf, and to dig it for that purpose. The plaintiff has this right exclusively of all others; and the defendant has disturbed him in it; therefore trespass lies, though he has not an absolute right to the soil. If this was only a right of common of turbary, trespass would not lie; but this is an exclusive right to dig turf. This must be taken to be a grant from the lord of the soil. The plaintiff stands in the place of the lord of the manor. The property of the turf is in the plaintiff; no other person could maintain this action. There is a difference between exclusive rights, and rights of common; in the former case, the grantee may take away thorns cut; but the commoner cannot. See Moore, 302; 2 Ro. Abr. 540; 20 Vin. Ab. 448. L. 4.

5. HARKER AND ANOTHER V. BIRREC AND ANOTHER, T. T. 1763, K. B. 3 Burr. 1556; 1 Blac. 482. S. C.

In an action of trespass upon the case, the plaintiffs declared that they had the sole liberty and privilege of digging for, getting and raising, lead ore, and taking the benefit thereof, in a certain place; but that the defendants, to de- ^{Trespass} ^{lies for en} ^{croaching} ^{on a lead} ^{mine.}prive them thereof, did sink for, raise, and get, within the same place, a great quantity of ore, and convert the same to their own use; on the general issue pleaded, a verdict was given for the plaintiff at the trial, with one shilling damages, subject to the opinion of the Court upon two questions; one of which was, whether for this injury an action on the case would lie, or an action of trespass only. *Per Cur.* It appears that the plaintiffs were in possession of the mine; and the injury done a clear and manifest trespass; hence the plaintiff has misconceived his form of action. Whoever is in possession of a mine may maintain an action of trespass for a wrong done to his possession; we are therefore of opinion that the action ought to have been trespass and the pos- tea must be delivered to the defendants. See 2 Blac. 973; Burr. 824. Co. Lit. 164.

6. REED V. HARRISON, T. T. 1777, C. P. 2 Blac. 1218.

In trespass for breaking and entering the plaintiff's house, and taking his cattle and goods, the defendant pleaded, first, not guilty; secondly, a justifi- ^{An officer} ^{continuing} ^{in posses} ^{sion of a} ^{house for} ^{an unreason} ^{able time} ^{under a fie} ^{re facias} ^{is liable in} ^{trespass.} ^[135]cation under an attachment issued against the plaintiff's goods, to compel him to appear and put in good bail to answer a plaint levied in the Court at N. or to surrender his body in discharge of his goods; by virtue of which attachment, the officers continued in possession of the plaintiff's premises for safe custody of the goods attached, according to the custom of the Court, from the 17th of July, 1775, to the 1st of January, 1776, when the plaintiff in that action having recovered final judgment, a precept in the nature of a *fiere facias* was issued, and on the 17th of January executed; after which there was another precept in the nature of a *venditioni exponas*, under which the goods were ultimately sold. To this plea the plaintiff demurred; and on argu- ment it was contended, 1st. That the defendant could not justify continuing in possession of the plaintiff's premises from July to January. 2ndly. That the goods attached ought to have been removed, and not kept on the premises by the officer. That in a distress for rent, they could not be lawfully kept there above five days; and staying longer made the distrainer a trespasser *ab inito*. Stra. 717. And though the practice is now altered by the 2 Geo. 2. with respect to distresses, yet the common law remains unaltered in regard to attachments. The counsel for the defendant thought these objections too cogent to be invalidated. Judgment entered for the plaintiff, without opposition.

Case not trespass, lies against a landlord occupying an upper room for entering a demised lower apartment through an aperture in his own unceiled floor and distraining;

7. *GOULD v. BRADSTOCK*, T. T. 1812, C. P. 4 Taunt. 562.

To an action of trespass for breaking and entering the plaintiff's premises, the defendant pleaded the general issue, and a special justification under the 11 Geo. 2. c. 19. At the trial it appeared that the plaintiff was in possession of the lower part of certain premises; and that the upper floor was occupied by the defendant, the plaintiff's landlord; that rent being in arrear, and the plaintiff having left the premises, defendant had taken up the floor of his own apartment, there being no intermediate plaistered ceiling, and entered through the aperture, and distrained. The jury found a verdict for the defendant, with liberty for the plaintiff to move to set aside. In support of an application for that purpose, it was contended that if this action was not allowed to be sustainable, the landlord might, according to such argument, take away the whole floor, and thus infringe with impunity the implied terms on which the rooms had been demised to the plaintiff.

Per Cur. The law is clearly with the defendant. The parties, under the circumstances, could only be tenants in common in the ceiling; and one tenant in common, although he might have a remedy in a different form of action, cannot bring trespass against his companion. And as the defendant entered the house without committing a trespass, he might, after being once lawfully in possession, distrain. Judgment for defendant.

8. *KEEBLE v. HICKERINGILL*, T. T. 1705, K. B. 11 East, 574, from Holt's MS.; Holt, Rep. 14; 11 Mod. 74. 130; 8 Salk. 9.

Case, not trespass, lies for firing guns near the plaintiff's decoy pond.

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The plaintiff declared that he was possessed of a close of land and decoy pond, to which wild fowl used to resort, and the plaintiff at his own cost had procured decoy ducks, and nets, and other engines, for decoying and taking the wild fowl, and enjoyed the benefit of taking them; yet the defendant, intending to injure the plaintiff in his decoy, and to drive away the wild fowl, and deprive him of his profit, discharged guns against the decoy pond, whereby the wild fowl were frightened away, and forsook the pond. Upon not guilty pleaded, a verdict was found for the plaintiff and 20*l.* damages. On motion in arrest of judgment, Holt, C. J. observed that the action was maintainable; that although it was new in its instance, yet it was not new either in the reason or principle of it. For, 1st. The using or taking a decoy was lawful. 2dly. This employment of his ground to that use was profitable to the plaintiff, as was the skill and management of that employment. As to the first, every man that hath a property may employ it for his pleasure and profit, as for alluring and procuring decoy ducks to come to his pond. To learn the trade of seducing other ducks to come there in order to be taken, is not prohibited either by the law of the land, or the moral law; but it is as lawful to use art to seduce them, to catch them, and to destroy them for the use of mankind, as to kill and destroy wild fowl or tame cattle. That when a man uses his art or skill to take them, to sell and dispose of for his profit, this is his trade; and he that hinders another in his trade or livelihood is liable to an action on the case for so hindering him.

Same Case and not trespass is the proper remedy for continuing holdfasts in the plaintiff's wall after he has recovered in trespass for the original sustained.

The Chief Justice added, that it had been objected that the nature of the wild fowl had not been stated; but this was necessary; for the action was not brought to recover damage for the loss of the fowl but for the disturbance. See *Carrington v. Taylor*, 11 East, 574; 2 Campb. 258; S. C. Peake, N. P.; *Precedents*, Petersdorff's Index, 118.

9. *LAWRENCE v. OBEE*, 1815, K. B. 1 Stark. 22.

The plaintiff had recovered damages in a former action for driving holdfasts in his wall. In the present suit the plaintiff declared generally in trespass, and sought to recover damages for the continuance of the encroachment. But Lord Ellenborough was of opinion that an action in that form could not be sustained.

act. Putting out a board which overhangs the

10. *PICKERING v. RUDD*, T. T. 1815, K. B. 1 Stark. 54; S. C. 4 Campb. 219.

In an action of trespass it appeared that the house of the defendant adjoined the garden of the plaintiff, and that a Virginia creeper which grew in the garden of the latter spread itself over the side of the defendant's house.

The defendant being desirous of hanging up a show board on that side of his house over which the branches of the plant had obtruded, contrived, without touching the surface of the plaintiff's premises, to cut away such parts of the vine as was sufficient to admit the show board, and affixed the board to his own house, projecting three or four inches from the wall, and so far overhanging the plaintiff's garden. *Per Lord Ellenborough.* It cannot be contended that the circumstance of the board overhanging the plaintiff's garden is a trespass. If it were so to be decided, the result would be that the trespass would lie for passing through the air in a balloon over the land of another. If any damage had really arisen from the object which overhangs the close, the remedy would have been an action on the case. Verdict for defendant. See 11 Mod. 74, 130; S. C. 3 Salk. 9; Holt, 14, 17, 19.

(c) Injuries to personal property.

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1. KETTLE V. HUNT, M. T. 1674, C. P. Bul. N. P. 78, a.

The plaintiff declared that he exercised the trade of a wheeler, and was possessed of several tools that related to the trade, viz. an axe, &c. and being so possessed, gained a livelihood, &c.; and by the licence of the defendant deposited them in his house, and that he had detained them two months after request, by which the plaintiff had lost the benefit of his trade. After verdict it was moved in arrest of judgment, because the plaintiff ought to have brought detinue or trover. But the Court held the action well brought; or, if he had had the goods again, detinue is not proper; and though a detainer upon request is evidence of a conversion, yet it is not a conversion, and the damages he demands in this case being special, the action ought to be special.

Where an injury arises from a breach of trust, the remedy is by action on the case and not by trespass or trover.

2. PITTS V. GAINCE, E. T. 1699, K. B. 1 Salk. 10; S. C. 1 Lord Raym. 558; S. C. by the name of Mikes v. Caly, 12 Mod. 381; Holt, 467.

In an action on the case the declaration stated, that the plaintiff was master of a ship which was laden with corn ready to sail, and that the defendant seized the ship, and detained her *per quod impeditur et obstructus fuit viagio*. An exception was taken to the action on the ground that it should have been trespass *vi et armis*; and 4 Edw. 3, c. 4; 13 Hen. 7, c. 26; and Palm. 47, were cited. Holt, C. J. observed, that in the cases cited the plaintiff had a property in the thing taken, but here the ship was not the master's but the owners. The master declared only as a particular officer, and could recover for his particular loss. He admitted, however, that the master might have brought trespass, and declared upon his possession, which was sufficient to maintain that action. See 3 Campb. 187-8.

Where a ship has been detained by the defendant, the master may bring either trespass or case at his election.

3. OXLEY V. WATTS, M. T. 1785, K. B. 1 T. R. 12.

In an action of trespass for taking a horse, the defendant justified, stating that the animal was an estray. Replication, that the defendant, after the taking, had worked the horse. It was objected that, as the original taking was admitted to have been lawful, the action should have been case, not trespass. *Sed per Cur.* The working of the estray renders the defendant trespasser *ab initio*. See 1 T. R. 536; Taylor v. Cole, 3 T. R. 292; Cro. Jac. 147; Yelv. 96-7; 1 Salk. 221; 2 Wils. 313; 3 id. 20; Bul. N. P. 82.

Trespass lies, and is not case for working an estray although the original taking be admitted to be lawful.

4. WARD V. MACAULEY AND ANOTHER, M. T. 1791, K. B. 4 T. R. 489.

In this action the plaintiff was the landlord of a house, which he had let ready furnished, and the lease contained a schedule of the furniture. An execution was issued against the tenant, under which the defendants, as sheriff, seized part of the furniture, although notice was given to the officer that it was the property of the plaintiff. The plaintiff having brought an action of trespass, the judge who tried the cause thought that trespass would not lie; however, a verdict was taken by the plaintiff, with liberty for the defendants to move to enter a nonsuit. *Per Cur.* The distinction between trespass and trover is well settled; the former is founded on possession, the latter on property. Here the plaintiff had no possession. His remedy was by an action of tro-

Where goods are leased to a tenant, the landlord's remedy against the sheriff for wrongfully seizing them, is case.

ver* founded on his property in the goods taken. Rule absolute. See 1 T. R. 480.

- [188] 5. DAY v. EDWARDS, T. T. 1794, K. B. 5 T. R. 648; S. P. SAVIGNAC v. ROOME, M. T. 1704, K. B. 6 T. R. 125.

When the declaration charges that the defendant furiously drove a carriage against the plaintiff's carriage, the action should be trespass;

In case; the plaintiff declared that he was driving a landaulet drawn by one horse, and that the defendant, on the same day, was driving a horse and cart, then under his management, and that the defendant so furiously and negligently drove the cart and horse, that it struck with great force and violence upon and against the carriage of the plaintiff. To which the defendant demurred specially, assigning for causes, that the declaration was for a mere consequential injury, whereas it appeared to have been an immediate and direct trespass; that the plaintiff had declared in trespass on the case, whereas it ought to have been trespass *vi et armis*, &c. Joinder and demurrer. *Per Cur.* The distinction between the action of trespass *vi et armis* and on the case is perfectly clear. If the injury be immediate the action must be trespass; if the injury be merely consequential, case is the proper remedy. And as the plaintiff complains of an immediate act, he should have brought trespass. Judgment for the defendant. See 1 Stra. 636; 2 Blac. 892; 2 Wils. 259; 6 T. R. 125; 8 T. R. 188.

Or where in an action for running down a ship, the injury is stated to have been done will fully.

6. OGLE AND ANOTHER v. BARNES AND OTHERS, T. T. 1799, K. B. 8 T. R. 188.

In an action on the case, the declaration alleged negligence and unskillfulness in the defendant's management of a ship, by reason whereof she ran foul of the plaintiff's vessel with great force and violence. After verdict for the plaintiff, a motion was made in arrest of judgment, on the ground that the action ought to have been trespass, not case. *Per Cur.* The jury having found a verdict for the plaintiffs, we must consider that the complaint set forth in the declaration was proved, and for such an injury an action upon the case is the proper remedy. But the negligent and improvident management of the defendants' ship did not imply that any act was done by them, after having been guilty of the negligence which led to the mischief; they might have done every

- [189] thing in their power to avoid the mischief, and then the running against by the plaintiff's vessel might have been owing to the wind and tide. Had the defendants been charged with having committed the act wilfully the rule would have been different. Rule discharged. See Reynolds v. Clarke, 1 Stra. 634; Haward v. Banks, 2 Burr. 1113; Davy v. Edwards, 5 T. R. 648; Savignac v. Roome, 6 T. R. 125; Tripe v. Potter, 6 T. R. 128; Morley v. Gaisford, 2 H. P. C. 442; Weaver v. Ward, Hob. 134; Scott v. Shepherd, 2 Blac. Rep. 892. S. C. 3 Wils. 403; Turner v. Hawkins, 1 B. & P. 472; 1 East, 106; 3 East, 593; 1 Sel. N. P. 435.

A. declared in case against B. for sinking his boat, and stated that B. neglected to slacken certain ropes, that he drove on the horses attached to as to permit the plaintiff to have passed; yet the said defendant, by his servants did not, nor would loosen the lines, or suffer the plaintiff's vessel to pass the boat of the defendant, but on the contrary, wrongfully and unlawfully drove the boat with force and violence, and thereby forced, &c. held in error, after verdict, that the word

7. TURNER v. HAWKINS. E. T. 1796, Ex. Cha. 1 B. & P. 472.

In an action on the case the declaration stated, that the plaintiff was possessed of a certain boat then navigating on a navigable river, and there drawn by certain horses affixed, and that the said vessel was under the superintendence of his servants; the declaration then alleged, that the defendant had also a vessel navigating on the same river, which was then and there hauled along the same river by horses, and was under the guidance of the defendant's servants; and that at the time of the committal of the act complained of, the plaintiff had occasion to pass the defendant's vessel, and the defendant's servants ought to have slackened the ropes to which the horses were attached, so as to permit the plaintiff to have passed; yet the said defendant, by his servants did not, nor would loosen the lines, or suffer the plaintiff's vessel to pass the boat of the defendant, but on the contrary, wrongfully and unlawfully drove the boat with force and violence, and thereby forced their boat against the plaintiff's vessel, by reason whereof the plaintiff's vessel was greatly damaged, and thereby he lost the benefit of a voyage, &c. Second count nearly similar to the first. Third and fourth, for improperly navigating their vessel. The defendant pleaded not guilty, and the plaintiff obtained a

* That trover would not lie, pending the demise, see Gordon v. Harper, 7 T. R. 9; and post, tit. Trover. A special action on the case is the only remedy.

verdict. Upon a writ of error being brought, the plaintiff in error assigned "thereby" for cause, that the declaration included two different forms of actions, distinct in their nature; to wit, causes of action for an immediate injury, which is trespass; and causes of action for a consequential damage, which is the object of an action on the case. *Per Cur.* We are of opinion, that after verdict this declaration may be justly supported, to entitle the plaintiff to judgment. Here it was incumbent on the defendant's servants to have slackened the lines so as to have enabled the plaintiff to have passed; consequently it is palpably clear that this action is brought for a *non-feazance*; and hence it may be inferred, that the plaintiff did not intend to charge the defendant with wilfully driving, &c. nor is it stated that he drove wilfully, but wrongfully; therefore, we think the circumstances alleged clearly prove it to be a *non-feazance*, for which case is maintainable.

8. *LEAME v. BRAY*, E. T. 1803, K. B. 3 East, 503; S. C. 5 Esp. 18.

Trespass; the declaration stated, that the defendant drove and struck a single horse chaise which he was then driving along the highway, with such force and violence upon and against the plaintiff's curricule, and the horses drawing it, and in which the plaintiff was then driving, that by means thereof the horses took fright, and ran away; upon which the plaintiff, to preserve his life, jumped out and fell upon the ground, and broke his collar bone. Plea not guilty. At the trial it appeared, that the accident happened on a dark night, owing to the defendant driving his carriage on the wrong side of the way, without any design on his part to injure the plaintiff; the objection that the injury resulting from negligence, and not from design, that the form of action should have been case, and not trespass, was taken and allowed, and the plaintiff accordingly nonsuited. A motion was made to set it aside; 1st. On the ground that it was immaterial, in order to decide as to the form of action, to consider whether or not the defendant intended to injure the plaintiff; 2d. That the defendant had impelled the horse forward, and from that the injury happened, and so there being an immediate injury from an immediate act of force by the defendant, the proper remedy was trespass. *Per Cur.* The distinction between the propriety of adopting case or trespass consists not in the consideration whether or not the injury was wilful, but whether the injury was direct and immediate, or mediate and consequential. Here, if the defendant had simply placed his chaise in the road, and the plaintiff had run against it, the injury would not have been direct, but in consequence of the defendant's previous improper conduct, and case would have been proper; but the injury happened from the immediate act of driving, which occasioned the concussion of the carriage, and trespass has been properly adopted. Rule absolute. See *Hob. 134*; 1 *Str.* 596; *Tripe v. Potter*, 6 *T. R.* 128; and 8 *id.* 191; *Ogle v. Barnes*, 8 *T. R.* 188; *Scott v. Shepherd*, 3 *Wils.* 403; 3 *Bl.* 895; *S. C. Reynolds v. Clarke*, 2 *Lord Raym.* 1402; 1 *Str.* 636; *Bull. N. P.* 26, 79; *Day v. Edwards*, 5 *T. R.* 649; 2 *Hen.* 7, c. 28, a. 1 *East*, 106; 2 *Lev.* 172; 6 *T. R.* 659; 2 *Campb.* 464; 3 *id.* 187; 2 *N. R.* 117; *Wayde v. Carr*, 2 *D. & R.* 255.

9. *ROGERS v. IMBLETON*, H. T. 1806, C. P. 2 *N. R.* 117. *SHELDRIK v. ABBERY*, 1793, 1 *Esp.* 55.

The plaintiff declared against the defendant for driving his cart against the plaintiff's horse, with force and violence, alleging it to have been done "by and through the mere negligence, inattention, and want of proper care of the defendant." The defendant demurred, on the ground that the declaration ought to have alleged that the act had been committed *vi et armis*. But the Court were clearly of opinion, that as the declaration charged the defendant with mere negligence, the demurrer could not be sustained. In this case, Sir J. Mansfield, C. J. expressed his disapprobation of the decision pronounced in *Leame v. Bray*, *supra*.

10. *COVELL v. LAMING*, M. T. 1808, 1 *Campb.* 497.

In an action of trespass for running the defendant's ship against the plaintiff's, it appeared that at the time of the accident the defendant was on board

Where a party driving on the wrong side of the road accidental ly comes in percus sion with the carriage of the plain tiff, held that tres pass was properly brought.

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When an injury is merely at tributable to neglect, the party injured has an election either to treat the negligence of defend ant as the cause of ac tion, and de clare in case; or con sider the act itself as the injury and declare in trespass. Trespass may be sup ported by the owner of one ves sel against

the owner of another, who is him self at the helm, and by whose unskilful ness the plaintiff's vessel was unintention ally run down.*

his ship, at the helm, but that there was a desire on the part of the defendant to steer clear of the plaintiff, and that the accident was to be ascribed to the mere unskilfulness of the defendant. It was contended, that as the act was not wilful, an action on the case was the proper remedy; but Per Ellenborough, C. J. "Whether the injury complained of arises directly or follows consequently from the act of the defendant, I consider as the only just and intelligible criterion of trespass and case. The winds and the waves were only instrumental in carrying her along in the direction which the defendant commanded. The force, therefore, originated with him.

11. DEAN V. BRANTHWAITE, T. T. 1803, 5 Esp. 35.

Trespass, for violently and immoderately driving the plaintiff's horses, by reason of which one of them died. The defendant pleaded a special justification, stating the facts which were afterwards proved in evidence. It appeared that the plaintiff had let the horses to the defendant to draw his carriage; that the defendant during the journey conceiving that one of the postilions was intoxicated, forcibly pulled him off his horse and mounted the animal himself, and rode so violently that the horse died with fatigue. It was objected that the remedy was misconceived, as the horses were let to the defendant for a limited purpose, who had during that time the complete control over them; that it was only a breach of trust, and could not be converted into a trespass. Per Lord Ellenborough. This objection to the form of action cannot avail. A person who hires horses to convey him in the manner here stated has not the entire management and power over the horses; they continue under the control of the stable keeper's servants, who were entrusted with the driving, and the stable keeper is answerable for any accident produced by the post-boy's misconduct on the road. Verdict for the plaintiff. See 1 E. & P. 409; 1 East, 106; 1 Chit. Pl. 71.

12. LORON V. CROSS, T. T. 1810, K. B. 2 Campb. 464.

Trespass, for running against the plaintiff's chaise and damaging it. It appeared that the plaintiff had lent the vehicle gratuitously to a third person, who was in actual possession of it at the time of the accident. On this ground it was suggested that trespass was not the appropriate remedy. Sed per Lord Ellenborough. Where there is a gratuitous permission to use a chattel, the possession constructively remains in the real owner, and he is entitled to maintain trespass for any immediate injury to it, notwithstanding the temporary bailment. See 1 T. R. 480.

13. HALL V. PICKARD, 1812, 3 Campb. 187.

In an action on the case, it appeared that the owner of a horse had let him to hire for a limited period, during which the animal was killed, by the defendant driving his cart violently against him. Per Lord Ellenborough. The horse having been let to a third party for a certain time, which was unexpired at the moment of the accident, the remedy adopted by the plaintiff is the proper and correct one. This is in the nature of an action for an injury to the plaintiff's horses, by reversion. See 1 Campb. 360; 7 T. R. 431; 1 Price, 53.

14. CROFT V. ALISON, T. T. 1821, K. B. 4 B. & A. 590.

The plaintiff declared as the owners and proprietors of a chariot, and that the defendant carelessly and negligently drove against the vehicle and damaged it.

* The following rules, extracted from the judgment delivered by Lord Stowell, in the case for the High Court of Admiralty, in the case of the Woodrose v. Sims, may be useful:—There are four probabilities, he says, under which an accident of this sort may occur. In the first place, it may happen without blame being imputable to either party, as where the loss is occasioned by a storm, or any other *vis major*. In that case the misfortune must be borne by the party on whom it happens to light, the other not being responsible to him in any degree. Secondly, a misfortune of this kind may arise where both parties are to blame, where there has been a want of skill or of due diligence on both sides. In such a case the rule of law is, that the loss must be apportioned between them, as having been occasioned by the fault of both of them. Thirdly, it may happen by the misconduct of the suffering party only, and then the rule is, that the sufferer must bear his own burthen. Lastly, it may have been the fault of the ship which ran the other down, and in this case the injured party would be entitled to an entire compensation from the other. See 2 Dodson, Adm. Rep. 85.

ged it. On the trial, it appeared that that the plaintiffs had hired the drivers, and horses, and that the injury had arose from the defendant's coachman improperly whipping the plaintiff's horses. On a motion for a new trial, it was objected that the plaintiff's had been mis-described, in stating them to be the owners and proprietors of the chariot. *Sed Per Cur.* The plaintiff's might well be considered, for the purposes of the declaration, as the owners and proprietors of the carriage; they were not mere temporary passengers, but had hired the vehicle for the day.

(d) *Injuries to the person.*

1. *UNDERWOOD v. HEWSON*, T. T. 1723, K. B. 1 Stra. 596.

The defendant was uncocking a gun, and the plaintiff standing to look at it, it went off and wounded him. It was holden that the plaintiff might maintain trespass. See 27 Hen. 7. 28; *Weaver v. Ward*, Hob. 134; per Lord Ellenborough, and Lawrence, J. 3 East, 595; 3 Wils. 411; 2 Bl. Rep. 894.

2. *SCOTT v. SHEPHERD*, E. T. 1773, K. B. 3 Wils. 403; 2 Blac. 892.

This was an action of trespass and assault against the defendant, for throwing lighted squibs at and against the plaintiff, and striking him therewith on the face, whereby he was deprived of the sight of one of his eyes. On not guilty pleaded, it appeared at the trial that the defendant, on the evening of the fair at Milborne Port, threw a lighted squib, consisting of gunpowder, and other combustible materials, from the street into the market place, and the squib being tossed from hand to hand by different persons to save their own property, was ultimately thrown into the plaintiff's face, and the combustible materials bursting, put out one of his eyes. The jury found a verdict for the plaintiff with 100*l.* damages, subject to the opinion of the Court, whether an action of trespass, under the circumstances, was maintainable? The judges Nares, Gould, and De Grey, C. J. were of opinion that the action was well brought; Blackstone, J. contra.

Nares and Gould J. The nature of the act, the time and place when and where it was done, made it highly probable that some personal damage would immediately ensue. The act was of a mischievous nature, and bespoke a bad intention; and whether the plaintiff's eye was put out immediately, the defendant who first threw the squib, is answerable in this action. But assuming that the defendant had no mischievous intention when he threw the squib, yet as the accident was not of an inevitable nature, this action will lie, for the *malus animus* of a defendant is not necessary to be alleged or proved. If the injury done be not inevitable, the person who does it, or who is the immediate cause, though by inadvertence, and against his will, is liable to an action of trespass. If the act in the first instance be unlawful, trespass will lie; but if the act is *prima facie* lawful, and the prejudice to another be not immediate but consequential, it must be an action upon the case. (1 Str. 535; 2 Lord Raym. 1399.) According to the facts now under consideration, the act in the first instance was unlawful; every subsequent act by the others did partake of the nature of the original aggression, and was *quasi causa causata* immediately and instant. If a man turns out a mad bull, ox, or other mischievous animal towards A., who turns him towards B., who turns the animal again towards C., whom it hurts, he who was the first actor, and turned out the beast, would be answerable in trespass.

Blackstone, J. The lawfulness or unlawfulness of the original act is not the criterion. The settled distinction is, that where the injury is immediate, trespass *vi et armis* will lie; where consequential only, it must be an action on the case. In the present instance the original tortious act was complete when the squib lay at rest on the stall of the second thrower, who of course had a right to protect himself by removing the squib, but he should have taken care to do it in such a manner as not to endanger others. This is not like the case of an enraged ox, or an arrow glancing against a tree, because in those cases the original motion, the *vis impressa*, is continued,

* Lord Ellenborough, in *Leame v. Bray*, 3 East, 596; that the above case of *Scott v. Shepherd* went to the limit of the law.

though diverted; but here the instrument of mischief was at rest until a new impetus and a new direction was given to it, not once only, but by two external agents successively.

De Grey, C. J. agreed with Blackstone, J. as to the principles he had propounded, but denied the mode in which he had applied those principles to the present case. He observed that whether the injury occasioned by the act be immediate and direct or not is the criterion, and not whether the act be unlawful or not. If the injury be immediate and direct, it is trespass *vi et armis*; if consequential, it will be trespass on the case. It has been admitted, that if a man turns a wild ox loose amongst people, not with any intent to hurt any one, and he gores a man, trespass *vi et armis* lies. The throwing the squib by the defendant was unlawful; the squib possessing an inherent power and tendency to do mischief. The other persons did act with or in combination with the defendant, and their removal of the squib from fear of danger to themselves seems to be a mere continuation of the first act of the defendant, and lasted until the explosion. No man contracts guilt by defending himself; the second and third men were not guilty of any trespass; but all the injury was occasioned by the first act of the defendant, for all the subsequent acts of throwing the squib must be considered as one single act, namely, the act of the defendant, the same as if it had been a cracker made with gunpowder, which had bounded and rebounded again before it had struck the plaintiff.

3. MORGAN v. HUGHES, H. T. 1788, K. B. 2 T. R. 225.

Where a justice of the peace maliciously and irregularly grants a warrant against a person without any information upon oath, the remedy against the justice should be trespass, not case.

The plaintiff in this case declared that the defendant, being a justice of the peace, without any charge or accusation against the plaintiff, made a warrant for his committal on a pretended charge of felony, directed to a constable, by virtue of which the plaintiff was taken and arrested, and kept in prison from the 14th of July until the 1st of Sept. Special demurrer; assigning for cause, that the supposed imprisonment, if committed at all by the defendant, was direct and immediate trespass, and that the plaintiff ought, for such an injury, to have brought an action of trespass, and not an action upon the case. *Per Cur.* The rule is perfectly clear, that where the act of imprisonment by one person is in consequence of information derived from another, case is the appropriate remedy; but here, as the act of imprisonment is the defendant's own personal and individual act, trespass alone would lie. It cannot be said to be the false imprisonment of the constable; he was bound to execute the warrant of the magistrate, having competent jurisdiction; hence if it were not holden to be an imprisonment by the defendant, we should be declaring that it was not an imprisonment by any person, and denying the facts admitted on the record. Where a party is committed to prison by the warrant of any justice of the peace without any accusation, the magistrate is the immediate and not the remote cause of the imprisonment. It is alleged on the record that the warrant was illegally granted, and it never was doubted but that in such a case trespass was the proper remedy. See 7 T. R. 633; 1 Saund. 228; 6 T. R. 447; 2 B. & P. 158; 4 Esp. 80; 6 T. R. 315; 1 Com. Dig. 170; 10 Mod. 209; Doug. 205; Cro. Eliz. 130; Cro. Jac. 131; 16 & 17 Car. 2. c. 8; F. N. B. 93.

But when ever an injury to a person is effected by regular process of a court of competent jurisdiction though maliciously resorted to, case is the proper remedy.

4. BELK v. BROADBENT, E. T. 1789, K. B. 3 T. R. 183. COOPER v. BOOTH, T. T. 1785, K. B. 3 Esp. 135. cited in Johnston v. Sutton, 1 T. R. 535. S. P. GOSLIN v. WILCOCK, E. T. 1766, C. P. 2 Wils. 302. SMITH v. CATTEL, E. T. 1768, 2 Wils. 376. MORGAN v. HUGHES, *supra*. STONEHOUSE v. ELLIOTT, T. T. 1795, K. B. 6 T. R. 315. BEECHER v. KING, 1782, Cited 1 Anst. 263. WHITE v. TAYLOR, M. T. 1801, N. P. 4 Esp. 80.

If a party be arrested without any cause of action, he has his remedy by an action on the case for maliciously holding him to bail. But it is incomprehensible to say that a person shall be considered as a trespasser who acts under the process of the Court. *Per Lord Kenyon, C. J.* See *tit. post*, Assault and Battery; Bankrupt; Imprisonment; Malicious Arrest; Malicious Prosecution; Trespass.

5. WEBB v. ALLEN. T. T. 1792, Exch. 1 Anst. 261.

Declaration in trespass for false imprisonment; justification under a judge's warrant to apprehend the plaintiff on an indictment for bigamy. Replication, new assigning, that after the making of the warrant; and that after the acquittal, the defendant, knowing thereof, imprisoned and caused the plaintiff to be imprisoned, and to be kept and detained in prison. The defendant, after verdict and judgment for plaintiff, assigned for error that the warrant at the time of committing the wrong complained of continued in full force, and that the supposed trespass was not, nor could legally be made the subject of an action of trespass *vi et armis*, but was the proper subject of an action on the case. For the plaintiff in error it was contended, that whenever an injury is committed under the sanction of a legal authority, although that authority be abused, the action is trespass on the case, and not trespass *vi et armis*. For the defendant in error it was contended, that as it was stated in the pleadings that the defendant knew of the trial, the subsequent arrest was not by virtue of the warrant, but only under colour of it. *Per Cur* If a warrant recites an indictment which does not exist, it may be questioned whether the warrant is any justification, as the basis of the authority fails; and that brings to the question, whether a warrant, which is *functus officio* when the indictment no longer continues to exist, has any force. The jury having found the defendant guilty of the trespasses here newly assigned, the Court cannot say that he has not committed a different trespass from that justified.—Judgment affirmed. See 4 Taunt. 67; 12 East, 67; 16 East, 13.

6. STONEHOUSE v. ELLIOTT, H. T. 1795, 1 Esp. 272.

Trespass for false imprisonment. The plaintiff it appeared, had been apprehended by a constable under the defendant's direction on a charge of having picked her pocket; but on being taken to Bow-street, had been immediately released, there appearing no pretext for the accusation. *Per Lord Kenyon, C. J.* Allowing an action for false imprisonment to be maintained where a complainant has mistaken the party to be charged would be highly injurious, as it would deter persons robbed from charging real delinquents; the proper action under such circumstances is case. Verdict for plaintiff, with liberty for the defendant to move for a nonsuit.

7. STONEHOUSE v. ELLIOTT, T. T. 1795, K. B. 6 T. R. 315.

On a motion being made for the leave to enter a nonsuit pursuant to the permission above stated, Lord Kenyon, after argument, said the doubt whether trespass was the proper form of action had originated with him; but he was now perfectly satisfied that trespass would lie, that form having been the remedy uniformly pursued. See *F. N. B. Caldecot*, 291; *Samuel v. Payne*, Doug. 358; *Burn's Just. tit. Arrest*; 2 *Selw. N. P.* 876. 5th ed.

(e) *Injuries to relative rights*.—See also *tit. Adultery*; *Baron and Feme*; *Master and Servant*; *Parent and Child*; *Seduction*.

1. WINSMORE v. GREENBANK, M. T. 1745. C. P. Willes, 537; S. C. Buller, N. P. 78.

The plaintiff declared that his wife, unlawfully and without his consent, had departed from him and continued absent; during which time a considerable real and personal estate had been devised to her, to her sole and separate use, and that thereupon she was desirous of returning, and again cohabiting with him, but that the defendant enticed and persuaded her to continue absent; by means of which she continued apart from him till death, whereby he lost the comfort and society of his wife, and the advantage he ought to have had from such real and personal estate. After verdict for the plaintiff and 3000*l.* damages, it was moved in arrest of judgment, that this was an action *primæ impressionis*. But the Court said that every action on the case was in itself a novelty; no action lies without damages, and the *per quod* will not alone be sufficient, unless the act done be unlawful; but though a bare enticement will not

* Novelty is no objection to an action if it be only unprecedented with reference to its particular facts, and new in its principle. See *Pasley v. Freeman*, 3 T. R. 63, *Chamberlain v. Williamson*, 2 M. & S. 415; and *Chapman v. Pickersgill*, 2 Wils. Rep. 145, where

be sufficient nor actionable, yet the jury, under the direction of the judge, are judges of the legality. And as receiving the servant of another *scienter* is a ground for an action *a fortiori*; it is so in the case of a husband; and injuries that are in their nature of spiritual cognizance, if attended with a temporal damage, are actionable. See *Guy v. Livesey*, Cro. Jac. 501; *Hyde v. Scysor*, Cro. Jac. 538.

2. *COURTNEY v. COLLET*, M. T. 1696, 1 Ld. Raym. 274. S. P. *DAVIS v. STANNION*, M. T. 1703, K. B. 2 Ld. Raym. 1942, *DITCHAM v. BOND*, E. T. 1814, K. B. 2 M. & S. 436; S. C. 3 Campb. 626. S. P. *WOODWARD v. WALTON*, T. T. 1807, C. P. 2 N. R. 476.

Trespass lies by a master for the battery of his servant, *per quod servitium amisit*.

Per Holt, C. J. If A. brings an action against B. for battery of his servant, *per quod servitium amisit*, it is a plain action of trespass. See 9 Co. 113; 10 Co. 330; Cro. Jac. 501; Cro. Eliz. 55; F. N. B. 90, 91. a; 1 Roll. Abr. 88; Peak, N. P. C. 55. 223; 5 East, 45. 47; 11 East, 23; 3 Bl. Com. 142; 2 Bl. Rep. 854; 2 Burr. 753; S. C. 2 Wils. 85; 3 Burr. 1878; 1 Stra. 634; 1 Esp. 386. For precedents, Ra. Ent. 555; and 2 Chit. Pl. 408. 3d ed.

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3. *HOPPER AND UX v. REEVE*, T. T. 1817, C. P. 7 Taunt. 698; S. C. 1 Moore, 407.

Or for driving against a chaise in which plaintiff's wife is riding, *per quod she is thrown out and injured*.

Trespass for driving a one horse chaise against a vehicle in which plaintiff and his wife were riding, whereby the wife was thrown out, and greatly injured. Pleas, not guilty, and a justification; upon which issue was joined, and the plaintiff obtained a verdict. A motion was made in arrest of judgment that the plaintiff should have declared in case, not trespass, and that it should have been distinctly alleged that the chaise was plaintiff's property; but the Court overruled both the objections. See 3 Wils. 403; S. C. 2 H. Bl. 892; 1 Ld. Raym. 558. 2 id. 1402; 3 East, 593; 1 Stra. 635; 1 Campb. 497; 2 id. 465; 2 Selw. N. P. 1281. 5th ed.

But a public performance is not a servant of that description which will enable his employer to bring an action against a defendant for beating him. Case, and not trespass is the proper remedy against a master for an injury sustained by the misconduct of his servant.

4. *TAYLOR v. NERI*, T. T. 1795, 1 Esp. 385.

Declaration against the defendant in case, for having assaulted and beat one B. engaged to perform at A.'s theatre, whereby he was deprived of B.'s services. But Eyre, C. J. being of opinion that B. could not be considered as the servant of A. nonsuited the plaintiff, observing that if the present action could be supported, any man whose servant, whether domestic or not, was detained a day from his business, could maintain an action. See F. N. B., G. 2 H.

(f) *Injuries occasioned by defendant's employ.*—See also tit. Master and Servant. Nuisance; Principal and Agent.

1. *MORELY v. GAISFORD*, E. T. 1794, C. P. 2 H. Bl. 442.

In case, the declaration stated that the plaintiff was possessed of a chaise and horse, and that the defendant by his servant so negligently drove his cart, that it struck against the chaise of the plaintiff with great force and violence, and broke the same, &c. A verdict was found for the plaintiff; and on the authority of *Day v. Edwards* (5 T. R. 648.) and *Savignac v. Roome* (6 T. R. 125) a motion in arrest of Judgment was attempted to be supported.

Sed per Cur. It is difficult to put an instance where the master can be considered as a trespasser for an act done by his servant which was not committed at his command; and therefore the rule laid down in the cases cited cannot be supported; as we are clearly of opinion that case, and not trespass, is the proper form of action. Rule discharged. See 2 Lev. 172; 1 Ld. Raym. 139; Dy. 238; 3 Mod. 323; 1 B. & P. 404; 1 Taunt. 568; 2 N. R. 446; 1 T. R. 659; 1 East, 106.

2. *HUGGETT v. MONTGOMERY*, T. T. 1807, C. P. 2 N. R. 446.

As when the defendant's ship is run against the plaintiff's by the negligence of the pilot of the former.

The plaintiff declared that the defendant with force and arms drove a vessel whereof the defendant was the commander, against and over a certain boat of the plaintiff, and sunk her, *damna, &c. contra pacem, &c.* It appeared that the defendant was master and owner of the vessel by which the *in Pratt*, C. J. in answer to the argument of novelty, observed, that he did not wish ever to bear it again, for torts were infinitely various not limited or confined; for there was not any thing in nature which might not be converted into an instrument of mischief.

jury to the plaintiff's boat had been committed; but that though on board at the time, he had not given the order which had occasioned the accident, but the pilot had; that the vessel would not obey her rudder, and that mischief was owing to no design or wilful act of any person on board. It was left to the jury to say whether the accident was attributable to the mere force of the wind or to negligence. The jury gave a verdict for the plaintiff. On a motion to set aside the verdict, and enter a nonsuit, on the ground that the action should have been an action on the case, and not trespass, the Court were of opinion that trespass could not be maintained against the defendant, and said the case differed from the case of *Leame v. Bray*, because here the defendant, though on board of the vessel, did not give the order which occasioned the accident, but the pilot did; whereas in *Leame v. Bray*, the defendant was driving the carriage that injured the plaintiff's vehicle. See *Covell v. Lamington*, 1 Campb. 537; and *ante*, p. 189. [198]

(I) ESTABLISHED FORMS OF ACTION TO BE OBSERVED.

1. *KER v. OSBORNE*. E. T. 1808, K. B. 9 East, 377.

In an action for money had and received, it appeared that the money in dispute had been paid by the defendant, with the consent and approbation of the plaintiff, to a trustee, and that the trustee, at the time of the action being brought, actually had the money in his possession. The Court without hearing any argument as to the other points in the case, asked how, after the parties had mutually agreed that the money in dispute should be paid over to third persons, stakeholders, the plaintiff could sue and recover it against the defendant who has so paid it over with his consent; and they stated that they were of opinion, that the agreement of the parties to rest on the merits, and take no advantage of matters of form, could not alter the case, or bind the Court to give judgment on the merits, when there appeared to be a clear objection to the action itself.* Judgment for defendant. See 4 Co. 94. b; 2 Hence Mod. Inst. 10; 3 Inst. C. 57; Reg. Pl. 276; Kerne, 461 1 Ld. Raym. 188; Bac. Ab. Abatement, 11; 2 Wooddes' Vin. Lecturo, 169. The parties cannot depart from them even by agreement.

2. *MARSHALL v. HOPKINS*, E. T. 1812, K. B. 15 East, 309.

In an action for money had and received, it appeared that the question intended to be litigated ought to have been raised by bringing an action of ejectment, and not an action of indebitatus assumpsit. The Court directed it to be understood, that they would not suffer questions to be agitated by the agreement of parties in an action for money had and received, where that action would not be sustainable by the general rules of law. The case was afterwards allowed to proceed as an indulgence, the amount in dispute being small.

VI. OF CIRCUITY OF ACTION.

1. *JOHNSON v. CARRE*, M. T. 1663. K. B. 1 Lev. 152.

In debt for rent on a lease for years, the defendant pleaded in bar, a covenant in

* See 6 T. R. 129, 130, where Lord Kenyon observed, that it was of the utmost importance that the boundaries between the different actions should be preserved. And in 1 H. the same Black. 243, Mr. Justice Wilson said, "it is highly necessary that the forms of actions should be kept distinct." And in Bos. & Pul. 476, Eyre, C. J. remarked, "that undoubtedly we ought to endeavour to preserve the distinction of actions; and if it appear upon the pleadings that actions of a different nature have been mixed, that is a sufficient ground for action on arresting the judgment." And in 1 Sira. 635, Sir John Pratt, C. J. observed, we must keep the deed up the boundaries of actions, otherwise we introduce the utmost confusion. See also 11 Mod. 180; 2 Burr. 1114; 2 Saund. 47. b; 2 Inst. 434; Fitzg. 85. To avoid a circuity, a

† In *Turner v. Davies*, T. T. 1669 K. B. Keil, 31. h. 35. a. which was an action of covenant, the plaintiff declared, that the defendant had covenanted with him to collect his rents in C.; and assigned a breach, that the defendant did not collect them. The defendant pleaded that the plaintiff himself had interrupted the same. It was insisted that the plea was not good; for if it was, the defendant might bring trespass against the plaintiff, and recover damages, and therefore it was no plea to the action. But *per Cur.* The plea is good in avoiding of circuity of action; for if the defendant should bring trespass and recover damages, then the plaintiff might have an action of covenant against the defendant and recover, which circuitous mode of proceeding the law will not suffer. But a cause of action against the plaintiff will be no bar to an action by him for avoiding circuity of action when the recovery in both actions is not equal, as in waste it is no bar that the plaintiff covenanted to repair, for in waste the plaintiff is entitled to recover treble damages, but the defendant in his action of covenant could only recover single. Moor, 23, pl. 80. [199]

covenant by the lessor that the lessee might deduct so much for charges. Upon the demurrer to this plea, it was said *Per Cur.* That the covenant being in the same deed is well pleaded in bar, the thing being executory, and the party shall not be put to the circuitous proceeding of bringing a cross action of covenant. See 1 Dow. 722; 1 Com. Dig. Action, H; Show. Ca. Parl. 17; Dowsh v. Jeffries, Cro. Eliz. 352; Hodges v. Smith, Cro. Eliz. 623.

2. GAUDEN v. DRAPER. M. T. 1789. C. P. 2 Vent. 217.

But it is otherwise when the covenant is in another deed, for the last deed does not take away the effect of the former; and a subsequent covenant cannot be pleaded in bar of a former; but the defendant must bring his action on the last indenture.

In an action of covenant, the plaintiff declared upon a deed made between the defendant and the plaintiff, whereby the defendant covenanted that S. (wife of the defendant) should be permitted to live separate from him the defendant, until the defendant and S. by writing under their several hands, attested and witnessed, should give notice to each other that they would again cohabit; and he the defendant further covenanted, that during the coverture, and until such notice should be given of their desire to cohabit, would pay to the plaintiff for the maintenance of S. 300*l.* per annum at quarterly payments; the declaration then stated, that the said S. from the indenture to the commencement of the suit, did live separate from the defendant, and no notice of cohabitation as aforesaid had been given during that time on either side; and that one quarter's payment of the salary was still in arrear and unpaid, and for the recovery of which this action was brought. To this declaration the defendant pleaded, that after the indenture aforesaid, and before the commencement of the said action, another indenture was made between the defendant and the said S. his wife, of the one part, and the plaintiff of the other part; which the defendant *p'fert hic in Cur.* reciting the first indenture, and further reciting, that the defendant and the said S. did then intend to cohabit, and did at that time cohabit; and expressing that it was the true intent and meaning of all the parties to the said indenture produced by the defendant, that so long as the defendant and the said S. should agree to cohabit, the said annual payment should cease. And the plaintiff did by the said last mentioned indenture, by the appointment of the said S. as by her appointed, being party thereunto, and her signing, sealing, and delivery thereof, covenant and agree with the defendant, that so long as the defendant and the said S. should cohabit, he should be saved harmless from the said 300*l.* annual payment, and that it should be lawful for him (during such cohabitation to detain the same, *ut per dictam indenturam plenius apparet*, and then averred that ever since the last mentioned indenture they did cohabit; wherefore, &c. Replication, that they did not cohabit *modo et forma*, *prout* the defendant *placitando allegavit et hoc petit quod inquirat*, &c. Demurrer, and joinder therein. *Per Cur.* As the cohabitation was not according to the first indenture, it is no bar; for the last deed has not taken away the effect of the former, it being a general rule that a latter covenant cannot be pleaded in bar to a former; but the defendant, if he wishes to have redress must bring his action on the last indenture.

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When the obligee of a bond covenants generally not to sue, the covenant will operate as a release, and may be pleaded in bar of the action: for if it operated only as a covenant, it would tend to circuity. But if A. & B. are jointly and severally bound and B. be jointly and severally bound to C. in a sum certain, and C. cove-

3. SMITH v. MAPLERACK. M. T. 1786. K. B. 1 T. R. 446.

Per Buller, J. It is a maxim in law to judge of contracts as to prevent a multiplicity of actions; upon which ground it is that courts have construed express words of covenant into a release. As supposing the obligee of a bond covenants not to sue on it, the courts say that shall operate as a release; for if it operated only as a covenant it would produce two actions.

4. LACY v. KYASTON. E. T. 1700. K. B. 2 Salk. 575; S. C. 12 Mod. 561; S. C. 1 Ld. Raym. 690. Recognized in DEAN v. NEWHALL. H. T. 1799. 3 T. R. 171.

A perpetual covenant not to take advantage of a covenant is a release; as if A. be bound to B. in a bond, &c. B. covenants never to sue A. upon the bond, this will be a bar in debt brought upon the bond because B. has bound himself against all the remedy that he might have upon the bond. But if A. and B. be jointly and severally bound to C. in a sum certain, and C. covenants with A. not to sue him, that shall not be a release, but a covenant only,

because he covenants only not to sue A. but does not covenant not to sue B. for covenants with A. on the last is not a release in its nature, but only by construction, to avoid circuit-ly not to sue him, then it shall be construed as a covenant, and no more. See *Cro. Eliz.* 623; *Hutton v. Eyre*, 6 Taunt. 289. this is not construed to be a release in its nature, but only to a void circuit-ty of action.

VII. OF SPLITTING ACTIONS.

1. *GIRLING v. ALDERS*, E. T. 1670, K. B. 1 Vent. 73, 2 Keb. 617. S. C. 1 Lev. 464.

On a motion for a prohibition, it appeared that A. had contracted with B. for divers parcels of malt, the money to be paid for each parcel being under 40s. and that B. had levied several complaints in an inferior court. The Court of K. B. granted the prohibition, observing that the plaintiff ought to have joined them all in one action, and have sued in that court, and not put the defendant to unnecessary vexation, by splitting an entire cause of action. See 2 Inst. 312; 2 Rol. Ab. 317, pl. 1; 1 Bac. Ab. 646; 4 Rep. 43; 1 Leon. 318; *Fetter v. Beale*, 1 Salk. 11; S. C. 1 Ld. Raym. 339; *Walker v. Dixon*, 2 Stark, 281. A party cannot separate one entire cause of action into parts, and sue for one part on one occasion and the other at another.

2. *GARDNER v. HELVIS*, H. T. 1684, C. P. 3 Lev. 248.

Declaration for words spoken of the plaintiff, an alderman of Norwich, and a justice of peace, viz. he is a rascally alderman, a factious alderman, a lampooner, with an averment that a lampooner is there understood to be a libeller; the defendant pleaded in bar a former action brought by the same plaintiff for the same words, only that in that action no interpretation had been given to the word lampooner, and that on that occasion the plaintiff was barred; upon a demurrer it was objected that the interpretation of the word lampooner in this action made it a different suit from the former, and the bar in that action is no answer to this. But adjudged that the plaintiff having been once barred in an action for the same words, he shall not entitle himself to a new action by a new interpretation of the same words. See *Bawell v. Kensey*, 3 Lev. 179; and post, tit. Slander. Hence in slander the plaintiff can not have a second action by a new interpretation of the same words.

3. *SEDDON et al. v. TUTOR*, E. T. 1796, K. B. 6 T. R. 607; S. C. 1 Esp. N. P. C. 401.

To an action for goods sold and delivered, the defendant pleaded a former recovery of 71l. 10s. replication, that the promises in this action were not the same as those in the former; on this allegation issue was joined. At the trial it appeared by the evidence that the plaintiff, in a prior suit, declared on a promissory note for 51l. and for goods sold to the amount of 25l. 7s; but on executing a writ of inquiry, after judgment by default, he gave no evidence on the count for goods sold, and took damages for the amount of the promissory note only. Afterwards on an application to the defendant for the 25l. 7s. he refused to pay, on which the present action was brought. There was a verdict for the plaintiff; and it was afterwards moved to set it aside, on the ground that the defendant ought not to be harrassed with the expense of two actions, when one would have answered the plaintiff's purpose. But if a plaintiff omits to give any evidence of a part of his demand in a prior action, though he had an opportunity of doing so he is not precluded from bringing another suit.

Per Cur. The issue was, whether the damages demanded in this action have been already satisfied by the recovery in the former action? and most clearly they have not. Here were two distinct demands, not in the least blended together; and though the plaintiffs might, in the first action, have proved this demand, owing to an inadvertence, they did not; and the recovery on the note in that action is no bar to their demand in this, which is for the price of goods; we must take care not to tempt persons to try experiments in one action, and, when they fail, to suffer them to bring other actions for the same demand. The plaintiff who brings a second action ought not to leave it to nice investigation, to see whether the two causes of action be the same; he ought to show, beyond all controversy, that the second is a different cause of action from the first, in which he failed; in this case it is clearly shown that the demand was not inquired into on the former occasion. See *Hitchen v. Campbell*, 2 Bl. Rep. 830; S. C. 2 Wils. 309; 1 Phil. Ev. 254, 3d. ed. and post, tit. Arbitration; *Rowe v. Farmer*, 4 T. R. 146; *Morben v. Thornton*, Esp. N. P. C. 180; 2 East, 81; *Laing v. Chatham*, 1 Campb. 251. [202]

The execution of a deceased rector may be sued in separate actions for dilapidations to different parts of the rectory.

4. YOUNG v. MUNBY, T. T. 1815, K. B. 4 M. & S. 183.

Declaration in case against the executor of a deceased rector, for dilapidation to the chancel of the church and pew. Plea, that the plaintiff had, in a prior term, recovered against the defendant damages for want of reparation of the rectory-house, out-houses, and cottages, belonging to the rectory, with an averment that the chancel and pew were in the same state of ruin and decay before and at the time of the commencement of the former action; and that the compensation now claimed might have been recovered in a prior action. Demurrer to plea, and joinder. In support of the former it was contended that the plaintiff could not separate one entire cause of action into parts, and sue for one part on one occasion, and the other part at another, but that he was imperatively bound to have included them in one.

An action does not lie before the cause of action accrues; and if its being premature is brought in abatement the Court if it appears on the record, will arrest the judgment.

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As in debt on bond for performance of covenants, if a breach be assigned as committed after the commencement of the suit it will be bad. Formerly, when a bill was entered on a day before the cause of action, and error brought thereon, the record could not be amended. But now it may at any time be amended on payment of costs.

Sed Per Cur. The damages sustained by the plaintiff originate from distinct and independent causes; the injury from the dilapidation of the rectory cannot be considered as identified with the non-repair of the chancel and pew; there is no entirety. In cases, however, of hardship, the Court would interpose and restrain an improper use of such a distinction. See 1 *Ld. Raym.* 339; 12 *Mod.* 542; 1 *Salk.* 11.

XII. OF BRINGING AN ACTION BEFORE THE RIGHT TO SUE HAS LEGALLY ACCRUED.

1. HARKER v. MORELAND, T. T. 1676, K. B. 2 *Lev.* 196. S. P. VERNABLES v. DAFER, H. T. 1689, *Carth.* 114.

A *scire facias*, tested 12th February, was brought by the plaintiff as administrator against the defendant. On oyer it appeared that the letters of administration were dated on the 26th of March. The defendant pleaded this in abatement; but after a general imparlance, the Court said, that although the plea was irregular, yet as it appeared upon the record that the plaintiff had brought his action prematurely, they were bound *ex officio* to abate the writ. See *Cro. Eliz.* 225; *Cro. Car.* 575; 1 *Leon.* 186; *Yelv.* 70; *Ca. Temp.* Hard. 141; 1 *Vent.* 135; 2 *Lev.* 13. 176; 1 *T. R.* 116; 1 *B. & P.* 367; 8 *T. R.* 456; 4 *East.* 75; 7 *T. R.* 4; *Com. Dig.* *Pleader*, c. 8; 1 *Saund.* 40, n. 1; 2 *Bl. Rep.* 735.

2. CHAMPION v. SKIPWETH, M. T. 1642, K. B. 1 *Sid.* 307.

Action of debt on bond. On oyer it appeared that the obligation was conditioned for the performance of covenants in an indenture. The defendant pleaded performance, and the plaintiff in his replication assigned a breach in the non-payment of rent becoming due after the commencement of the suit. Demurrer, and judgment for the plaintiff.

See *Lit. Rep.* 61; *Cro. Car.* 272, 282; 3 *Leon.* 51; *Hob.* 198.

3. RUSH v. TORY, M. T. 1693, K. B. 4 *Mod.* 367.

In judgment on a *mutatus* the bill appeared to be filed on a certain day, viz. "*memorand. quod die veneris*," &c. which happened to be before the debt became due. Upon a writ of error to reverse the judgment the above was assigned for cause; and on motion on behalf of the plaintiff, to make the memorandum of another day, conformably with the judgment, the Court said it was irregular, and refused the amendment. See 10 *Mod.* 340; 1 *Ld. Raym.* 182.

4. DICKINSON v. PLAISTED, H. T. 1798, K. B. 7 *T. R.* 474. S. P. GUY v. KITCHNER, T. T. 1747, C. P. 2 *Stra.* 1271; S. C. by the name of HAY v. KITCHIN, 1 *Wils.* 171.

On a writ of error, on a judgment given for the plaintiff in an action on a promissory note, assigning for cause that the bill was filed before the cause of action accrued, it appeared that the plaintiff had, without the consent of the defendant, or without the permission of the Court, procured the roll to be amended. The defendant considering this mode of proceeding to be irregular, obtained a rule to show cause why the roll should not be amended in the usual course, and why the plaintiff should not pay the costs of the amendment. *Per Cur.* The amendment by the plaintiff without the permission of the Court was highly indecorous, and ought to be severely censured in order to prevent a recurrence of such a practice. We can never suffer any records to be al-

tered without our express order; though had the plaintiff applied to the Court, we should have granted the rule for the amendment; consequently this rule must be made absolute. See East, 133; 1 M. & S. 232.

5. *DOBSON v. BELL*, M. T. 1675, K. B. 2 Lev. 176; S. C. T. Jones, 87; 3 Keb. 693. *S. P. WARD v. GANSELL*, H. T. 1771, C. P. 3 Wils. 154; S. C. 2 Bl. Rep. 735. *PUGH v. ROBINSON*, H. T. 1786, K. B. 1 T. R. 116.

Trover for goods alleged to have been converted on the 20th April; the declaration was entitled generally of Easter Term, which began on the 20th April. It was objected, in arrest of judgment, that on the face of the record the action appeared to have been maturely brought; but on making it appear that the bill was filed and declaration delivered after the 20th April, judgment was entered for the plaintiffs; and it was said, that though the declaration being general rates to the first day of the term, yet the bill being filed on the day after,* all the proceeding, by the course of the Court, relates to the filing of the bill, of which practice, on error brought, the Court will take notice. See 1 Chit. Pl. 261, 266, 3d ed.; 1 Tidd. 631, 7th ed.; and post, good.

tit. Declaration.

6. *MORRIS v. PUGH*, M. T. 1761, 3 Burr. 1242; S. C. 1 Bla. Rep. 312. S. [204] *P. RHODES v. GIBBS*, 1804, 5 Esp. 163.

An action of trover; the demand and refusal appeared to be subsequent to the bringing of the action; for according to the *nisi prius* roll, the bill was filed of Easter term, and consequently, as there was no special memorandum, it had reference to the first day of the term, which was in the beginning of April, and long before the demand and refusal (which was proved not to have been made till the 2d of May) it was objected that the declaration could not be supported; in answer to this suggestion the plaintiff's counsel produced the writ which appeared to have been sued out after the 2d of May. The validity of this evidence being disputed, the point was reserved for the opinion of the Court. And after hearing it argued at the bar, the Court were of opinion in favour of the plaintiff, and thought that the writ was properly receivable in evidence. It is true, if there be no special memorandum, the bill by fiction of law, relates to the first day of term; but fictions in law hold only in respect of the ends and purposes for which they were invented; when they are applied to an intent and purpose not within the reason and policy of the fiction, the other party may show the truth. The bill is not the commencement of the suit; the writ is; and being after the time to which the bill relates, shows that there should have been a special memorandum. Judges ought to lean against every attempt to nonsuit a plaintiff upon objections which have no relation to the real merits, much more when the plaintiff is clearly entitled to recover upon the merits, and must recover in another action. It is unconscionable in a defendant to take advantage of the *apices litigandi*; turn a plaintiff round and make him pay costs, where his demand is just. Against such objections every possible presumption ought to be made which ingenuity can suggest. How disgraceful then would it be to the administration of justice to allow chicanery to obstruct right by the help of a legal fiction, contrary to the truth of the fact. See 1 Sid. 432; 1 Vent. 264; 1 Wils. 171; 1 Stra. 1721; 3 T. R. 361; 7 T. R. 619.

7. *GUY v. KITCHENER*, T. T. 1747, K. B. 2 Stra. 1271; 1 Wils. 171.

In an assault and battery, the memorandum was generally of Michaelmas Term, and the facts on the plea *son assault*, were proved to have taken place on a day within the terms. On a case being made it was held well enough, for the plaintiff was not compellable to give evidence on this plea, unless to

* Whether the declaration be delivered or filed on the first day of the term, or after, is not now material, for where the cause of action was stated to have accrued on the first day of the term, the Court of King's Bench, on demurrer, held that it might be entitled in the term, generally; for the delivery of the declaration is the act of the party, and in ancient times it is well it could not have been delivered until the sitting of the court, so that the cause of action might well have accrued before the actual delivery of the declaration. *Pugh v. Robinson*, cited ante, 203.

Stating the cause of action to have accrued on the first day of the term, where the declaration is entitled generally of the term, is good.

But in actions by bill, if it appears by the memorandum that the bill was filed before the cause of action (as proved at the trial) accrued the plaintiff must be nonsuited, unless he prove that the writ or process was sued out after the accrual of the action;

Although in trespass, if the memorandum be of the term generally, and the fact be

proven on a special justification to have been committed within the term, it is well enough.

aggravate damages; and the court will nonsuit him, because it is amendable by a new bill.

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Or where the *continuando* in trespass is to the middle of the term; but otherwise if the *continuando* be carried beyond the end of the term. In suits by bill & bailable writ may be sued out before the cause of action accrues; but *semb.* that an action lies for a malicious arrest if a bailable writ be executed.

8. ANONYMOUS. M. T. 1673, K. B. 1 Vent. 264.

Trespass, with a *continuando*, which alleged that the aggression had continued beyond the first day of the term. Verdict for plaintiff. It was moved in arrest of judgment, that according to the plaintiff's own showing, the action had been brought before the plaintiff had any cause of action; and it was said, that if the bill was filed at the end of the term, and the trespass was continued to some day within the term, the filing should not relate so far as to make it insufficient. But here the injury was alleged to have continued to the 3d July, which the Court, of its own knowledge must be aware is after the end of the term.

9. SWANCOTT v. WESTGARTH, T. T. 1803, K. B. 4 East, 75.

In an action for goods sold and delivered on credit, it appeared, on reference to the special memorandum of the bill, that the action was commenced in due time; but the writ being proved to have been sued out before the expiration of the credit, the defendant had a verdict. A rule nisi was obtained for a new trial, as the defendant was arrested upon an *alias*, after the time limited had elapsed, and not upon the original writ. *Per Cur.* Although the day of issuing the writ may be replied to by the statute of limitations, and may be shown for various other purposes, yet the Court must look to the filing of the bill as the commencement of the suit. The issuing of the writ is merely process to bring the party into court. The defendant, however, if actually arrested before the time for which the credit was given has expired, may have an action for a malicious arrest. Rule absolute. See Foster v. Bonner, Cowp. 454; Best v. Wilding, 7 T. R. 4; 2 B. & P. 235; 2 East, 33; 11 East, 118; 1 B. & P. 343; 1 Esp. 159; 2 id. 22; 2 Chit. Rep. 11; Cro. Eliz. 271; Cro. Jac. 561; 1 Vent. 28; 8 Mod. 343; 1 Wils. 142; 2 Burr. 967; Doug. 62; 2 W. Saunders, 1.

10. KERR v. DICK, H. 1820, K. B. 2 Chit. Rep. 11.

On a rule to show cause why the proceedings in this case should not be set aside for irregularity, it appeared that the defendant had been arrested on a bill of exchange before it became due. *Per Cur.* When a party intends to defeat an action on the ground of its having been prematurely brought, he should apply to the Court to set aside the proceedings, for if the cause proceeds to trial, he cannot avail himself of the objection; now in this case it appears that the defendant has been deprived of his personal liberty by means of this irregular proceeding. We are, therefore, of opinion that the defendant should not be discharged merely on the terms of filing common bail, but that the writ ought to be entirely set aside. Rule absolute. See Foster v. Bonner, Cowp. 454; Best v. Wilding, 7 T. R. 4; Swancott v. Westgarth, 4 East, 75.

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Action. Notice of.—See also tit. *Attorney*.

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I. WHEN NECESSARY TO JUSTICES OF THE PEACE.

1. BIRD v. GUNSTON, E. T. 1783, K. B. Cited 1 Tidd. 27, 7th edit.

It is sufficient to entitle a justice to the benefit of the statute of 24 Geo. 2.

A justice acting as such, tho' erroneously is entitled to notice under 24 Geo. 2. s. 44 s. 1.*

* By this act it is directed, "that no writ shall be sued out against, nor any copy of any process at the suit of a subject shall be served on, any justice of the peace for any thing by him done in the execution of his office, until notice in writing of such intended writ or process shall have been delivered to him, or left at the usual place of his abode by the attorney or agent for the party who intends to sue, or cause the same to be sued out or served, at least one calendar month before the suing out or serving the same, in which notice shall be clearly and explicitly contained the cause of action which such party hath, or claimeth to have, against such justice of the peace, on the back of which notice shall be endorsed the

c. 44. s. 1. that he conceived himself to be acting as a justice, of the peace, though what he did was not in the regular execution of his office.

2. **BRIGGS v. SIR FREDERICK EVELYN**, T. T. 1792; C. P. 2 H. Bl. 114. S. P. GROVES v. ARNOLD, E. T. 1812, 3 Campb. 242.

On a rule to show cause why a nonsuit should not be set aside, it appeared that the plaintiff, a gamekeeper, had brought an action of trover for a gun against the defendant, who acted as justice of the peace and lord of the manor, for seizing a fowling-piece, which the plaintiff had sent to a gunsmith's to be repaired, between the 20th and 30th of August. During that interval the defendant went to the blacksmith's shop for the purpose of searching for guns and other engines used for the destruction of game; and finding the plaintiff's gun he seized and detained it. At the trial it was contended, that the defendant having acted in the capacity of justice of the peace, was entitled to a month's notice, pursuant to the 14 Geo. 2. c. 44. and the judge before whom the cause was tried entertaining the same opinion, the plaintiff, was accordingly nonsuited.

Per Cur. We should not in general be inclined to protect a justice of the peace when he exceeds his jurisdiction. But here we are of opinion that he acted purely in that capacity, and consequently he was entitled to a month's notice, as prescribed by the act of parliament. Rule discharged. See 2 Selw. N. P. 865. n; 3 Burn's Just. 141. 23d edit.; Christian's Game Laws, 153; 2 Arch. Prac. K. B. 150; and see Gaby v. the Wilts Canal Company, 3 M. & S. 580.

3. **WELLER v. TOKE**, E. T. 1808, K. B. 9 East, 364.

A magistrate, without the concurrence of any other magistrate, committed a person for not filiating her bastard child, upon a summons to appear before himself, from which imprisonment she was discharged by his order. She brought an action of trespass and false imprisonment against him. On the trial it was objected that the transaction had taken place twelve months before, and that no previous notice of the action had been given, as required by the 24 Geo. 3. c. 44. The plaintiff, was nonsuited. A motion was made to set aside the nonsuit. *Sed per Cur.* The defendant had authority to act as a magistrate upon the subject matter of the complaint brought before him, though he could not act alone. Hence though the act of commitment cannot be said to have been done by virtue of his office, yet the subject matter was within his jurisdiction, and he intended to act as a magistrate at the time, however erroneously. Had the act done by him been wholly extrajudicial, we should have adjudged that he was without the protection of the law. Rule refused.

4. **WRIGHT v. HORTON**, 1816, C. P. Holt, N. P. C. 459.

In an action of debt for penalties against the defendant, on the stat. 18 Geo. 2. c. 20. for having acted as a justice of the peace without a proper qualification, it was contended, that no previous notice of action having been given, the plaintiff, must be nonsuited. But Wood, Baron, overruled the objection, observing that the only question to be tried was, whether the defendant was or was not a magistrate.

II. WHEN NECESSARY TO REVENUE OFFICERS.

1. **IRVING v. WILSON**, M. T. 1791, K. B. 4 T. R. 485.

The plaintiff was owner of a quantity of hams, which were coming from Scotland in three carts, and he had a permit for their removal. One of the carts being a mile and a half before the rest, was met by the defendants, who were excise officers, who demanded the permit. They were informed that it was the name of such attorney or agent, together with the place of his abode, who shall be entitled to have the fee of twenty shillings for the preparing and serving of such notice, and no more."

* The statute 28 Geo. 3. c. 37, s. 35, which regulates the present practice, enacts, that no writ or process shall be sued out against any officer of the customs or excise, or against any person or persons acting by his or their order, and for any thing done in the execution, or by reason of that or any other act or acts of parliament then in force, or thereafter to be made, relating to the said revenues or either of them, until one calendar month next after

[208] was with the carts which were behind, notwithstanding which they seized the three carts. Afterwards the matter being explained, they refused to deliver up the carts unless 2l. 11s. was paid for their release; this sum was paid, and the present action brought to recover it back. It was adjudged that the money was clearly recoverable, as being obtained by extortion from the plaintiff; and that though under the stat. 22 Geo. 3. c. 70. s. 32. the officer is entitled to a month's notice before an action can be brought against him, yet in this case he was not, for this action was for an act not done *colore officii*, and therefore notice was unnecessary; and Grose, J. was of opinion that the statute applies only to cases of trespass or tort, not to actions of *assumpsit*.

2. GREENWAY v. HURD, H. T. 1792, K. B. 4 T. R. 553.

But in as **sumpsit a** This was an action for money had and received, against the defendant, an excise officer, for the recovery of a sum of money paid by the plaintiff for duties on cotton, after the statute creating the imposition had been repealed. The Court expressed an opinion that the officer was entitled to notice, although the plaintiff sued in *assumpsit*, because the defendant acted as an officer of the excise when he received the money, and plaintiff paid it to him in that character. There was, however, another point in the case, and it does not appear clearly on which the case was ultimately determined.

3. DANIEL v. WILSON, M. T. 1792, K. B. 5 T. R. 1.

Or where **an excise** **officer has** **done an act** **really ille** **gal, but un** **der the ho** **na fide sup** **position** **that he was** **bound to do** **so in dis** **charge of** **his duty.** Action for an assault and battery. It appeared in evidence that the defendant was an excise officer, and had, immediately before the assault, been engaged in pursuing and detecting smugglers; that the plaintiff passed the defendant, laden, with something on his back, and on being interrogated by the defendant said that he had nothing to deliver, being only a fisherman; the defendant then, in endeavouring to ascertain whether the property he had with him was exciseable, struck the plaintiff. It was objected, against the tenability of the action, that a notice had not been served, according to the 23 Geo. 3. c. 70. s. 30. but this was attempted to be answered by saying that the act had not been committed in execution of the defendant's office, which was necessary, in order to render a notice requisite. *Per Cur.* The defendant acted in the supposed execution of his duty, and is clearly entitled to the protection afforded by the legislature, to persons in his situation.

4. CLEMENTS AND WIFE v. KEEN, H. T. 1805, C. B. 2 Smiths, 220.

An extra **man not ap** **pointed by** **the board** **of excise, is** **entitled to** **the benefit** **of this act,** **or at least** **he is enti** **led to it as** **a person ac** **ting under** **an excise of** **ficer, if he** **be sent to** **make a** **search** **though no** **regular offi** **cer be pres** **ent.** In an action for an assault it was proved that the defendant was not an excise officer, but one acting under the surveyor of the excise, and called an extraman; and though not appointed by the board of excise, yet he received the same pay as an excise officer. It was also shown that the defendant in that capacity had had reason to suspect that the plaintiff's wife had concealed some spirits about her person, and in endeavoring to find it, he committed the act complained of. At the trial it was contended that, under 20 Geo. 3. c. 37. s. 23. the defendant, acting as a person in pursuance of the excise laws, was entitled to notice of action. In this opinion the judge, before whom the cause was tried, concurred; and the plaintiff was nonsuited. On a motion to set the nonsuit aside it was urged, that the defendant, not being an excise officer, was not entitled to notice, the words of the statute being, that "no action shall be brought against any excise officer or officers, or any person acting under him or them, unless," &c. That here neither the surveyor of excise, nor any other regular officer, being present when the search was made, the defendant could not be esteemed as acting in a capacity within the protective provisions of the statute. But the Court expressed a strong opinion against the plaintiffs, and observed, that whether he was an excise officer or not, he acted under the excise laws, and was entitled to notice of action, as prescribed by the statute. Rule discharged.

notice in writing shall have been delivered to him or them, or left at the usual place of his or their abode by the attorney or agent for the person or persons who intends or intend to sue out such writ or process as aforesaid, in which notice shall be clearly and explicitly contained the cause of action, the name and place of abode of the person or persons in whose name such action is intended to be brought, and the name and place of abode of the said attorney or agent, and that a fee of twenty shillings and no more shall be paid for the preparing and serving of such notice. See also 23 Geo. 3. c. 70, s. 30, and 24 Geo. 3. c. 47, s. 85.

5. UMPHREY v. M'LEAN. M. T. 1817. K. B. 1 B. & A. 42.

In an action of assumpsit, for money had and received, to recover back from the defendants, collectors of taxes, the difference between the legal expense of a distress for arrears, and excessive charges made and obtained by the defendants, it was submitted that notice of action, pursuant to 43 Geo. 3. c. 99, ought to have been delivered prior to the commencement of the suit; but to this objection it was stated, and assented to by the Court, that the action contemplated by the legislature is that species of civil remedy which is used to obtain a compensation for a tortious act committed, not to cases where the action is instituted for omitting to do that which ought to have been done, i. e. return the money. The statute only applies to actions of *tort*, when the damages are uncertain and dependant upon the verdict; not when a precise sum is demanded, founded upon a contract, for the non-payment of which no tender of amends could possibly be pleaded. Rule to set aside verdict for the plaintiff discharged.

But an action against collectors of taxes to recover back excessive charges for a distress, under 43 Geo. 3. c. 99,* is not an action accruing by reason of any thing done in pursuance of that act and no previous notice need be given.

III. TO OFFICERS OF PUBLIC COMPANIES.

WALLACE AND ANOTHER v. SMITH, Treasurer of the West India Dock Company. E. T. 1804. K. B. 5 East, 115; 1 Smith, 346. S. C. S. P. LEWIS v. SMITH. T. T. 1715. Holt, N. P. 27.

The declaration stated, that the plaintiffs had been brokers or agents, employed by divers consignees of property, &c. arriving from the West Indies, in landing it, paying the necessary duties, and delivering it to the respective owners for a reasonable reward. That a ship had arrived, the owners of which were accustomed to employ the plaintiffs as brokers, &c. but that the plaintiffs were prevented by the defendant's servants from executing their commissions. Plea, not guilty. At the trial it appeared that by an order of the court of directors, all other brokers had been prohibited from acting, except a particular person appointed to act for the company. A verdict was taken for the plaintiffs; and a rule nisi was obtained to set it aside and have a new trial; on two grounds: 1. On the general construction of the statutes relating to the West India Dock Company; 2. That fourteen days notice in writing had not been given to the defendant previous to bringing the action. *Per Cur.* It is expressly required by the 184th section of 39 Geo. 3. c. 69. "That all actions to be commenced by or against this company shall be brought by or against the treasurer of this company;" and by the 185th section of the same act it is provided, that no action shall be commenced against any person for any thing done in pursuance of, or under colour of this act until fourteen days' notice shall be thereof given." When, therefore, the company are obliged to be sued in the name of their treasurer, to say that he is not a person within the meaning of the act would be too narrow, by construction the clause without any sufficient reason. Whether this rule extends to assistants, from the case of *Irving v. Wilson*, 4 T. R. 458. extremely doubtful. But in the present case, the rule must be made absolute. Rule absolute. See *Everett v. Cooch*, 7 Taunt. 1; *Lewis v. Smith*, Holt, N. P. C. 27.

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The treasurer of the West India Dock Company is entitled in an action on the case to 14 days' notice, under the 185th section of 39 Geo. 3. c. 69:1

IV. FORM AND REQUISITES OF THE NOTICE.

1. LOVEFACE v. CURRY. E. T. 1798. K. B. 7 T. R. 631.

A rule had been obtained to set aside a verdict in an action for false im-

* The 70th section enacts that if any action shall be brought against any person for any thing done in pursuance of that act, such action shall be commenced within six calendar months next after the fact committed; and no writ or process shall be sued out until one calendar month next after notice shall be given to the defendant; and the defendant may within the month tender amends, and may plead the same, if not accepted in bar of the action; and see the enactments in the 43 Geo. 3. c. 99, s. 70, that no action shall be commenced, for acts done in collecting the assessed taxes, until one calendar month next after notice in writing shall have been delivered to, and left at the usual place of abode of the party intended to be sued; and see the 57 Geo. 3. c. 99, s. 40, which prohibits any suit being commenced against spiritual persons for any penalty or forfeiture incurred under any of the provisions of that act, until a notice in writing of the intended process shall have been delivered to them, or left at the porter's usual place of abode, one calendar month before suing out the same.

† And see the statute 39 & 40 Geo. 3. c. 48, § 181, in which there are similar provisions as to the London Dock Company.

The notice to a justice of the peace must express the nature of the writ or process intended to be sued out as well as the cause of action.

prisonment against a justice of the peace, for an act committed by him in that capacity, on the ground that the notice given pursuant to the 24 Geo. 2. c. 44. was insufficient, as it did not express what particular process the plaintiff intended to sue out, and the cause of action intended to be relied on; the Court concurred in the validity of the objection, observing that the question to be determined was whether or not the terms of the act 24 Geo. 2. c. 44. have been complied with, and that if they had not been complied with, the action could not be maintained. That the words of the statute were clear and unequivocal, and required two distinct things; 1st. That the plaintiff should give notice in writing of the writ or process that he intends to have recourse to. 2dly. That such notice should contain the cause of action. The plaintiff not having acted conformably to these provisions, the notice given is insufficient, and the rule must be discharged.

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2. SATIN v. DE BURGH. T. T. 1809. N. P. 2 Campb. 196.

It is not necessary, however, that the form of action should be stated in the notice.

In an action for false imprisonment, the notice, after describing the act of imprisonment, which constituted the subject of the complaint, concluded with a notice that "a bill of Middlesex would be sued out against the defendant for the said imprisonment, and that the plaintiff would proceed against the defendant thereupon according to law." This notice it was contended was invalid as it did not specify the form of action, which under the 24 Geo. 2. c. 44. was necessary. *Sed per* Lord Ellenborough, C. J. A specification of the form of action is superfluous; all that is rendered requisite by the act is, that the nature of the process should be stated and the cause of action.

3. STRICTLAND v. WARD. Winchester Summer Assizes, 1767. Reported in a note to LOVEACE v. CURRY, *Vide supra*.

But the plaintiff having given notice of one sort of action, can not declare in another.

The plaintiff gave notice that he intended to bring an action on the case against the justice for assault and false imprisonment; and afterwards brought an action for trespass and false imprisonment. Yates, J. held the notice insufficient, as tending to mislead the justice of the peace, who might know that an action on the case was improper, and such whereon the plaintiff might be nonsuited, and neglect to tender amends. See *Massey v. Johnson*, 12 East, 67; *Gray v. Cookson*, 16 East, 13.

4. HYDER v. DORRELL. M. T. 1808. C. P. 1 Taunt. 383.

A notice purporting to be founded on a particular statute is not available as a notice under another statute.

This was an action of trespass against a person in the employ of the commissioners under a local paving act; it was objected that the notice had referred to the 47 Geo. 3. c. 38. s. 55. when, in point of fact, the person on whom it was served has been appointed by the commissioners acting under 30 Geo. 3. c. 58. s. 68. and consequently the plaintiff could only recover for an act done under the former act, and not under the latter; particularly as the variance might conduce to a misconception on the defendant's part. In this opinion the court concurred; and a rule previously obtained to set aside a non-suit was discharged.

5. AGAR v. MORGAN. H. T. 1816. Exch. 2 Price. 126.

A separate notice to each of several persons intended to be sued in trespass is sufficient to found a joint action against all of them for a tort committed in

The 215th section of the Regent's Canal Act enacts, "that no plaintiff shall recover in any action for any thing done in pursuance of the act, unless notice in writing shall have been given to the defendant or defendants, or left at his, her, or their last or usual place of abode, fourteen days before such action shall be commenced, of such intended action, signed by the attorney for the plaintiff or plaintiffs, specifying the cause of such action; nor shall the plaintiff or plaintiffs recover in such action, if tender of good and sufficient amends shall have been made to him, her, or them, or to his, her, or their attorney, by or on behalf of such defendant or defendants, before such action brought." An action of trespass had been instituted against several officers of the company, and a verdict found for the plaintiff; the notice was addressed to each of the officers by name, in the following terms: "I do hereby as the attorney of, &c. for W. A. of &c. give you notice, that at, or soon after, the expiration of fourteen days from the time of your being served with this notice, or from the time of this notice being left at your place of abode, I shall commence an action against you at the suit of the said W. A., and proceed thereupon according to law." It was objected that as the notice

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pursuance of an act of

was in all respects several, and purported to apprise each of the defendants of parliament, a separate action being intended to be commenced against him individually, although and the action brought being joint both in form and effect, it could not be maintained, as not being the action of which notice had been given; which must tend materially to embarrass the defendants, and render exceedingly difficult, if not wholly impracticable, the object for which it had been provided, the tender of sufficient amends; and that therefore the plaintiff ought to have been nonsuited. In showing cause against the rule for a nonsuit, it was argued, that if any difference could arise from joining several together in this action of trespass, it must operate in favour of the defendants, whose advantages are enlarged, and not diminished, by such a mode of proceeding; were any of them prejudiced indeed by being sued with others, the argument would be entitled to some consideration. The objection, at all events, would have been obviated, if all the defendants had been named in the addressing part of the notice, it is, therefore, an objection to the heading only, and merely formal. Had the action indeed been joint against four, and the trespass had not been proved against all, that might have afforded a colourable objection; but as a trespass proved against several is a trespass in each and every one, the joinder of the defendants cannot be an objection to such an action, available to either; for in actions of trespass, all the defendants are principals, and each is liable for the whole damage proved. *Per Cur.* In all cases of trespass the action is joint and several; and the plaintiff is not obliged to confine himself to trespasses committed individually; for the act of one is the act of all, and the act of all is the act of each. Assuming this proposition to be correct, the language of this notice is sufficiently explicit; it is, "I give you notice that I shall commence an action against you;" this may mean either alone, or with others. As to the danger of the plaintiff's receiving a two-fold satisfaction, one cannot suppose that such a thing could happen from separate tenders; and if they were all to tender satisfaction, the plaintiff would have no right to accept it. A tender by one, if accepted, would be a satisfaction for all; and it is a common plea to state that the trespass was committed with others, who have made satisfaction. You could not plead the non-joinder of others in abatement. The same notice has been given to every one of the defendants, and is therefore in effect a joint notice, because you might have given in evidence joint trespasses in an action founded upon it.

6. *WILLIAMS v. BURGESS*, T. T. 1810, C. P. 3 Taunt, 127.

The plaintiff had given the defendant, a custom house officer, notice under the 23 Geo. 3, c. 70, s. 30, of his intention to bring an action of trespass the plain against him for having on a particular day, broken open the plaintiff's dwelling-house in C. in the parish of N. G. in the county of M. but the plaintiff's place of abode did not appear on any other part of the notice. It was therefore suggested, and the opinion afterwards adopted by the Court, that as there was no distinct statement of the plaintiff's present place of residence, the mere inference capable of being collected from the description of the house where the trespass was alleged to have been committed, was not sufficiently particular or positive.

7. *LEWIS v. SMITH*, T. T. 1815, Holt, N. P. C. 27.

In an action of trover against the defendant as treasurer of the West India Dock Company, it was objected that a notice, preliminary to bringing the action, had not been delivered to the defendant, conformable with the 39 Geo. 3, c. 69, s. 185. This objection was endeavoured to be obviated by producing a letter addressed by the plaintiff's attorney to the defendant, wherein he stated "that he had instructions to take legal measures if the property claimed was not delivered up," and by proving that the attorney for the company had acknowledged the receipt of the letter, and requested to see certain documents connected with the plaintiff's title. *Sed per Gibbs, C. J.* The attorney's letter was merely an application of courtesy, and not a formal notice. Plaintiff nonsuited.

8. *OSBORN v. GOUGH*, M. T. 1803, C. P. 3 B. & B. 550.

In case against a justice of the peace for maliciously refusing to accept sure-

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A notice of action for a trespass in the plaintiff's dwelling-house at C. is not a sufficient description of the plaintiff's place of abode at the time of the notice. A letter from an attorney, stating that he is instructed to take legal proceedings unless a demand be complied with, is not a sufficient notice of action. It is sufficient for

the attorney who gives the notice to describe him self generally of the town in which he resides as "of Birmingham."

ties for the plaintiff's appearance, the notice of action was endorsed "W. J. of Birmingham, in the county of W. attorney for the within named, W. O." at the trial a verdict was found for the plaintiff. It was argued in support of a rule for a nonsuit that the statute of 24 Geo. 2, c. 44, had been always rigidly construed; that the town of B. was a place of great extent, and that the object of the act was to enable the defendant, without difficulty or loss of time to find out the attorney and tender amends; that by allowing such a general description to be a sufficient statement of the residence of the attorney would be frustrating the design of the legislature. *Sed Per Cur.* The proper interpretation to be put upon the statute is, that if the place endorsed upon the notice be the true place of the attorney's abode, it lies on the defendant to show that such description has not afforded him the opportunity intended to be given him by the act of parliament. In the present case no evidence has been adduced that the attorney could not have been found, if reasonable diligence had been exercised. The true rule appears to be, that such a reasonable notice ought to be given as will enable the defendant to make a tender. The analogy between notice of bail, and notice of action cannot be sustained. Persons offering themselves as bail frequently reside in obscure situations and being only a two day's notice, must necessarily be very accurate, or the limited time of inquiry would elapse before the bail could be found. And although the description ought not to be quite vague, and should, perhaps, be stated with that particularity which would be sufficient for a venue, yet, where such a description as the present is given, no difficulty can arise.

[214] But it must appear from the words used that the place at which the notice is dated is the place of the attorney's abode. A notice in which the attorney describes him self as of New Inn, London, instead of Westminster, is insufficient.

9. *TAYLOR v. FENWICK*, M. T. 1782, K. B. cited by Lawrence, J. in *Love-lace v. Curry*, 7 T. R. 635; S. C. 3 B. & P. 553, a.

The notice in this case had been written by the attorney, and signed by him thus, "given under my hand at Durham." It was holden insufficient, as it did not expressly state that Durham was the place of the attorney's residence; and that the statute having prescribed a particular form, that form ought to be implicitly followed, and admitted of no equivalent.

10. *STEARNS v. SMITH*, 1810, 6 Esp. 138.

In this case, the notice to the defendant, a justice of the peace, was signed J. S. New Inn, London; when it was proved that where the attorney lived was New Inn, Westminster. Per Lord Ellenborough. The plaintiff must be called. See as to this kind of variance, *Goodes v. Wheatley*, 1 Campb. 231; *Goodtitle dem. Pincent v. Lammiman*, 6 Esp. 128; S. C. 2 Campb. 274; *Doe dem. Gunston v. Welch*, 4 Campb. 264; *Williams v. Burgess*, 3 Taunt.

V. TIME, HOW COMPUTED.

CASTLE v. BURDITT, E. T. 1790, K. B. 3 T. R. 623.

Trespass for seizing, &c. a quantity of tobacco; plea, not guilty. The defendants, it appeared, were excise officers, and within the protection of the 23 Geo. 3, c. 70, which enacts, "That no writ shall be sued out against any person acting in the execution of that statute, until one calendar month next after notice in writing shall have been delivered to him." The notice was served on the defendants on the 28th of April, and the writ sued out on the 28th of May.

[215] It was objected at the trial, that the writ was sued out a day too soon; and Gould, J. being of that opinion, nonsuited the plaintiff. But the Court of King's Bench set it aside, because, where computation of time is to be made from an act done, the day on which the act is done is to be included in the reckoning. See *Clayton's case*, 5 Rep. 1; *Osborn v. Rider*, Cro. Jac. 135; *Rex v. Adderley*, Doug. 463; *Lacon v. Hooper*, 6 T. R. 224; *Glassington v. Rawlins*, 4 East, 407; and see also *Godin v. Ferris*, 2 H. Bl. 14; *Saunders v. Saunders*, 2 East, 254; *Cooke v. McTavish*, 1 Bing. 167.

Adding Bail.—See tit. Bail.

Adding Counts.—See tit. Declaration.

Adding Pleas.—See tit. Plea.

Addition *—And see tit. *Affidavit; Devise; Grant.*

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I. WHEN AND IN WHAT MANNER THE ADDITION IS TO BE STATED IN GENERAL.

1. THE KING v. ROBERT FIELDING, T. T. 1607. K. B. 12 Mod. 199.

Robert F. after being attainted by outlawry for high treason by the name of R. F. Esq. obtained a pardon, and brought a writ of error, assigning for cause, that before and after the finding of the indictment he was known by the name of Robert F. yeoman, and not esquire, as described in the indictment. Per Holt, C. J. It would have been a better assignment of error to have recited the statute of 1 Hen. 5. c. 15. but it will be sufficient; that being a general law, the Court will judicially take notice of it.

2. REX v. LORD BRANDON, M. T. 1686, K. B. Comb. 70.

Upon an indictment for a forcible entry, it was contended that it could not be sustained, because the defendant's addition had not been inserted according to the statute. Per Cur. An addition is unnecessary, except in the case of outlawry; and if it had been essential, it would have been aided by the appearance. See 2 Hale, 177, 199; Cro. Eliz. 148; C. C. C. 35; Bac. Ab. Indictment, G. 2; Misnomer, B. 2; Cro. Eliz. 148.

3. LEPIOT v. BROWNE, T. T. 1703, K. B. 6 Mod. 198; S. C. Holt, 141; S. C. 1 Salk, 7.

B. being removed by *habeas* into the custody of the marshal, was declared against by the name of J. B. of, &c. in the custody of the marshal, and plead in abatement that he was not distinguished from his father in the declaration, whose name was the same, and who resided in the same town. Per Cur. Had this been a suit by original, and the father and son resident in different counties, the addition of junior would have been unnecessary; but this being an action against B. in *custod. mareschalli*, it should have been shown that the father was also in *custod. mareschalli*, and therefore judgment of *respondeas* ought to be awarded. See Lord Raym. 304; 2 Inst. 670; Stiles, 394; Holt, 380; Com. Rep. 260; 1 Viner, Ab. Addition, n; 1 Com. Dig. Abatement, f. 21.

4. EARL OF BANBURY v. WOOD, M. T. 1702, K. B. 1 Salk. 5; 3 id. 20; 6 Mod. 84; 3 Lord Raym. 987; Holt, 41, S. C.

In a *homine replegiando*, the defendant appeared and pleaded in abatement.

* An addition is necessary in all original writs, in actions personal, appeals, indictments and presentments, or in other proceedings upon which the defendant may be outlawed; 2 Leon. 200; but the plaintiff's or prosecutor's addition need not, in any case, be inserted. See 2 Leach, 961; 2 Hale, 142; Burn, J. Indictment; Bac. Ab. Indictment, G. 2. It seems, that, even at common law, before the statute of additions, it was necessary to state the rank and degree of the defendant, if he were a knight or any higher dignity, in addition to the surname and name of baptism; and if he were a lord, to supply the place of the surname. So if he were indicted in respect of his office, that addition should be given him. But the stat. 1 Hen. 5. c. 5. very much extended this rule; by that statute it was enacted, that in all original writs of actions, personal appeals, and indictments, and in which the exigent shall be awarded, addition shall be made in the names of the defendants, of their estate, or degree, or mystery, and of the towns, or hamlets, or places, and counties, of which they are or were conversant; and that if these additions be omitted, any outlawries founded thereon shall be void, and the proceedings shall be abated by the exception of the party. In the construction of the statute, it has become a settled rule, that the words "estate or degree" have the same signification, and include the titles, dignities, trades, and professions of all ranks and descriptions of men.

ment that there was no addition of place. The plaintiff demurred for a replevin is not *vi et armis*; and in actions *vi et armis*, process of outlawry only will lie. *Per Cur.* Process of outlawry lies in replevin, and the king is entitled to a fine. The words of the statute of H. 5. are that in every original, in actions personal, wherein process of exigent lies, &c. That statute is construed strictly. In the present case the original replevin is *vi-countiel*, and we must proceed on the *pluries*; therefore the first replevin needs no addition within the statute; and where the first writ is without addition, it cannot be necessary in the second; nay, the insertion of such an addition would vitiate the second writ, because, where any writ or process is founded on a former one, it must not vary from the first writ. See Cro. Eliz. 869; 3 Salk. 20; Holt, 41; 2 Inst. 665; 4 Mod. 347; Noy. 135; 25 Hen. 6. c. 6; 2 Rol. Ab. 835; F. N. B. 220; Plow. 228; 1 Inst. 128; 25 Edw. 3. c. 17.

Nor in any writ that is *vi-countiel*; or in an *alias* or *pluries* writ, where no addition was required in the original.

An addition by replea in abatement, that T. P. against whom the bill is exhibited, is a gentleman, and not an esquire. On demurrer it was contended that the plaintiff ought to have replied that the defendant was an esquire and not a gentleman, and that alleging it with a *habitus et reputatus fuit* was bad, because the addition ought to be true and certain: and Powell, J. inclined to that opinion; but C. J. Holt said, that in these cases the addition was only a description of the person, and common reputation was sufficient, the suit being by bill. But it would have been otherwise on an original, on which process of outlawry lies. See 19 Hen. 6. c. 51; 26 Hen. 6. c. 56; 11 Hen. 6. pl. 25.

5. BENNET V. PURCHELL, M. T. 1701, K. B. 2 Ld. Raym. 849.

To an action of assumpsit against the defendant by the name of T. P. Esq. plea in abatement, that T. P. against whom the bill is exhibited, is a gentleman, and not an esquire. On demurrer it was contended that the plaintiff ought to have replied that the defendant was an esquire and not a gentleman, and that alleging it with a *habitus et reputatus fuit* was bad, because the addition ought to be true and certain: and Powell, J. inclined to that opinion; but C. J. Holt said, that in these cases the addition was only a description of the person, and common reputation was sufficient, the suit being by bill. But it would have been otherwise on an original, on which process of outlawry lies. See 19 Hen. 6. c. 51; 26 Hen. 6. c. 56; 11 Hen. 6. pl. 25.

6. REX V. BROUGH, H. T. 1784, C. P. 1 Wils. 244.

To an information in the nature of a *quo warranto*, against the defendant for exercising the office of mayor, he pleaded that at the time of exhibiting the information, he was a gentleman, and not an esquire; *absque hoc*, that he was an esquire. On a motion to set this plea aside, it was contended that an information in the nature of a *quo warranto* was not within the statute of additions. To which opinion the Court inclined, observing that there never was any process of outlawry upon an information in the nature of a *quo warranto*, which is not like a *quo warranto*, by original writ, which was in use before the present mode of proceeding was adopted. The statute of additions is to be construed strictly, and only extends to cases where process of outlawry lies.—Judgment, *quod respondeat oster*.

7. BENNET V. PURCEL, M. T. 1701, K. B. 2 Ld. Raym. 849.

A suit was by bill against T. P. Esq. It is no plea in abatement that the defendant is a gentleman, and not an esquire, because the suit by bill, the addition, was only a description of the person, and common reputation is sufficient for it; but it should be otherwise upon original, on which process of outlawry lies; because the stat. H. 5. requires an addition in such case. *Per Holt, C. J.* And judgment that defendant answer over.

8. THE KING V. SEMPLE, 1786, 1 Leach, 420; S. P. 3 Salk. 20.

The indictment stated that I. G. H. otherwise Semple, otherwise Kenedy, labourer, did feloniously, &c. A motion was made to quash the indictment, because the addition had been placed after the *alias dictus*, and not after the first name, which was immediately granted by the Court. See Cro. Eliz. 198, 583; 2 Inst. 669; 2 Hale, 171; Hawk. b. 2. c. 25, s. 70; c. 2. s. 126; Bac. Ab. Indictment, G. 2; 1 Saund. 14. a. 1; Saund. 68; Arch. Crim. pl. 7.

9. THE KING V. HANNAM, 1787, 1 Leach, 420.

A motion was made to quash an indictment on the ground that the addition had been placed after the *alias dictus*, and not the first name. *Sed Per Cur.* Although the insertion of the addition after the *alias dictus* is a clear and manifest error, yet it is aided by the prisoner pleading on his arraignment.

10. SIR WILLIAM HICKS'S CASE, M. T. 1670, K. B. 1 Vent. 154; S. C. 2 Keb. 824.

In an action against the defendant by the name of Sir William Hicks,

Or in actions by bill. If the addition to prisoner's name be placed after the *alias dictus*, and not after the first name, the indictment will be quashed. But if the prisoner plead to the indictment, the defect is cured. [218] If two additions be

knight and baronet, he pleaded in abatement that he was never knighted. inserted, The plaintiff moved, and obtained leave, to amend. and one be false it will vitiate the other.

11. *DRAYCOTE v. CURZON*. H. T. 1698. C. P. 1 Lutw. 40. n. In the addition of the estate, degree, or mystery, by the stat. 1 H. 5. c. 5. Or if he be of the writ purchased, and not with a *nuper es nup. ar &c.* because men are not describ frequently altering the place of their habitations. See 17 H. 4. c. 28; 19 Ed. 6. c. 66; 21 Hen. 6. c. 3; 38 Hen. 6. c. 34; 2 Inst. 670; 1 Com. Dig. Abatement, F. 26; Arch. Crim. Pl. 8; 1 Chit. Crim. Law, 205. ing to his present de gree, but as "late" &c.

12. *THE KING v. MARY GRAHAM*. 1791. 2 Leach. 547; S. P. 2 Salk. 451. The indictment stated the property to belong to James Hamilton, Esq. A dignity commonly called Earl of Clanbrassil, in the kingdom of Ireland; it was deter- which a par mined that the more correct and technical mode of description would have ty holds in been James Hamilton, Esq. Earl of Clanbrassil, in the kingdom of Ireland; any country except Eng but the judges being of opinion, that in this case the words commonly called land, should might be rejected as surplusage, held that the indictment was good. See 9 not be stated; Co. 118; Sty. 173.

hence a peer of Ireland should not be described by his name of dignity, but by his proper name.*

II. OF STATING THE ADDITION OF ESTATE OR DEGREE.

1. *JEFFERY v. SNOW, BART.* M. T. 1686-7. K. B. Comb. 65.

The plaintiff sued the defendant, describing him as baronet; the defendant includes an inferior de pleaded in abatement, that he ought to be named miles and baronet. *Per gree; and it Cur.* The superior degree necessarily includes the inferior; and the plaintiff cannot be must have judgment. See 14 H. 6. 15; 2 Inst. 669; Hawk. b. 2. c. 23. s. objected that both are not sta 103; 1 Chit. Crim. Law, 206. ted.

2. *REX v. ———*. M. T. 1678. K. B. 2 Show. 84.

This was an indictment for a rescous committed by the "wife of J. S." [319] and others. It was objected that the husband's addition had not been insert- Qu. If des ed; and that describing the defendant as wife of J. S. of such a parish, without cribing the more, was insufficient. No judgment was given. See 6 Mod. 58; 9 Edw. 4. pl. party as the "wife of J. S." is 8; 3 Hen. 6. pl. 31; Dyer, 47; 2 Hawk. P. C. c. 23. § 111; 2 Leon. 183. sufficient addition.†

3. *REX v. BISHOP of CHESTER*. H. T. 1695. K. B. 5 Mod. 302; S. C. 2. Salk. 560; Carth. 440. S. C.

In error, on a writ of *quare impedit*, the cause assigned for error was a Calling a knight an variance between the pleading and the letters patent; the defendant having knight an set forth a grant made to W. F. *tunc armigeo postea militi*, when upon oyer an esquire is a of the letters patent, they appeared to be granted to W. F. *militi*. *Per Cur.* fatal vari The defendant could not be a knight and an esquire at the same time; knight ance. being a word of dignity, and a part of his name, but esquire is not; the vari- ance is material, and the plaintiff must have judgment. See 8 Mod. 84; Cro. Car. 205; Comb. 65; 1 Show. 304; Latch. 161; 4 Bac. Ab. 211.

4. *THE QUEEN v. HOSKINS*. T. T. 1702. K. B. 2 Lord Raym. 968; S. C. 6 Mod. 58; Holt, 41, *contra*.

A motion was made to quash an indictment for want of a proper addition, "Servant" is a good The defendant was indicted by the name of J. S. servant; which, it was con- addition.‡ tended, was too general, and not conformable with the stat. 1. H. 5. c. 5. But *per Cur.* This is a good addition, and sufficiently certain.

5. *HORSEPOOL v. HARRISON*. T. T. 1722. K. B. 1 Stra. 556. S. P. SMITH v. MASON. M. T. 1728. K. B. 2 Lord Raym. 1541; 2 Stra. 816.

In an action by original against the defendant, describing him as a yeoman, by his de

* Though it has been said, that an Irish bishop might be indicted by the addition of his gree or diocese; see 21 H. 6. c. 36; Hawk. b. 2. c. 23. s. 109; 1 Com. Dig. Abatement, f. 26; Bae. Ab. Misnomer, b. 2. Qu. if this distinction is founded on the difference between tem- trade, at poral and spiritual dignities; or if it exists at all since the act of union? the election of the plain tiff.

† The usual and technical mode is to describe a married woman thus: "Mary, the wife of Richard Roe, late of the parish of C. labourer"; 2 Lev. 183.

‡ See 7 Ed. 4. 108; 9 Ed. 4. 50; where it is said, that describing a person as servant is bad, unless it be stated that he was servant of some particular and named individual. 1 Com. Dig. Abatement, F. 26; 2 Inst. 668; Hawk. b. 2. c. 23. § 111; Bro. Add. 5. 42; Bac. Ab. Indictment, G. 2.

he pleaded in abatement that he was a lime-merchant and not a yeoman; and on demurrer, the Court held the plea ill, and awarded a *respondeas ouster*, upon the ground that every man, be he a trader or not, has a degree by which he may be denoted; and having a degree, it is in the election of the plaintiff to sue him by one or the other, and if he sue him by his degree, it is not enough for the defendant to say he is of such a trade, because he does not give the plaintiff a better writ. In this case the defendant should have shown himself to be of a degree higher than a yeoman; and that would have abated the plaintiff's writ. This was ruled upon the authority of a former case, (*vide post*, p. 221.) where a man sued as yeomen, pleaded he was a horner, and the Court awarded a *respondeas ouster*.

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A dowager countess must be described as a dowager. *Semb.* An esquire should not be described as a gentleman.

6. *BROUNKER v. ATKINS*. M. T. 1680. K. B. Skin. 15.

A countess dowager ought to be named *comitissa dotissa*, otherwise the writ will abate. Per Pemberton, C. J.

7. *MESSOR v. MOLYNEUX*. H. T. 1740. C. P. cited 1 Wils. 245.

In a motion for a *procedendo*, an affidavit was produced wherein a person therein named gentleman, appeared to be a barrister; the Court would not permit the affidavit to be read, because a barrister is an esquire by his profession or office. See *Spellman's Gloss. Armiger*; 1 Bl. Com. 406; *Christian's Game Laws*. 132.

8. *HOLT v. WARD*. M. T. 1729. K. B. 2 Stra. 850; S. C. Barnard, K. B. 209; Fitz. 175. 275.

Clarenceux is part of the name of the person.

To a declaration against the defendant by the name of K. W. Esq. he pleaded in abatement that the late king by letters patent created him king at arms, and principal herald of the south-east and west parts of E. *et nomen ei imposuit Clarenceux*; to hold *tam diu quam se bene gegerit*; unde he was not styled *Clarenceux* in the bill, he prayed it might abate. The plaintiff cravedoyer of the letters patent, by which it appeared that he was styled K. W. Esq. before the words of the creation, and demurred; on argument it was held that this must be taken not as an addition, but as part of his name, and therefore gave judgment to abate the bill. See Sir William Dethick's case, Cro. Eliz. 542; 1 Leon. 248.*

III. OF STATING THE ADDITION OF MYSTERY.†

1. *THE QUEEN v. HOSKINS*. M. T. 1702. K. B. 6 Mod. 58; S. C. Holt, 41. S. P.; 7 Edw. 4. 106; 7 Edw. 4. 50; 3 H. 6. 316; 5 Edw. 4. 32.

"Servant to J. S." is a good addition.

A servant being indicted for a trespass, was described as A. B. servant to J. S.; exception was taken that the word servant was not a good addition.

Per Holt, C. J. Servant to J. S. is a good addition, and as certain as "gentleman." See 8 Mod. 61; Ld. Raym. 264. 849. 1170; Y. B. 3 Hen. 6. pl. 31; 9 Edw. 4. pl. 48; 2 Hen. 4. pl. 7; 2 Hawk. P. C. c. 23. s. 112.

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But a woman must not be described as "fabearer."

2. *THE QUEEN v. FRANKLYN*. T. T. 1704. K. B. 2 Ld. Raym. 1179.

The defendant being indicted for exercising the trade of sempstress, without having served an apprenticeship. Powell J. took an objection to the indictment, that the defendant was called labourer, which he said was not a good addition for a woman. See 2 Inst. 668. Bro. Add. 559; Hawk. b. 2. c. 23. § 111; Arch. Crim. Pl. 8.

3. *MASON v. BUSHEL*. T. T. 1721. C. B. 8. Mod. 51.

Yeoman; for horner is not a mis addition, as the defendant may be sued by his degree or mystery.

The defendant being sued as a yeoman, pleaded that he was a horner, and traversed that he was a yeoman. Eyre, J. was of opinion that the defendant

* See Bro. Add. 44; East. 358; Bac. Ab. Misnomer, B. 3; from which it appears that gentleman and esquire are convertible terms and may be used for each other without variance.

† Mystery means the defendant's art, trade, or occupation, such as merchant, mercer, tailor, parish clerk, schoolmaster, husbandman, labourer, or the like. 2 Hawk. c. 23. s. 111. If a man have two trades, he may be sued of either; 2 Inst. 668; but if a man who is a gentleman by birth, be a tradesman, he should be named by his worthier addition of gentleman; ib. 669; in all other cases he may be indicted by his addition of degree or mystery, at the option of the prosecutor. See 8 Mod. 52, 25; 1 Stra. 556; 2 Stra. 816; 2 Lord Raym. 1561.

‡ Although "yeoman," and "labourer," are both valid additions; yet whether the appellation of "farmer" is good, is extremely questionable; the better opinion appears to be that it is not so, because it is of equivocal signification; and if any art be implied by it, the

ought to have given the plaintiff a better writ, in the same species of addition; but Pratt, C. J. doubted whether it was necessary to be in the same species. See 2 Ld. Raym. 1541; 1 Stra. 556; 2 id. 826; Com. 371.

4. ROBINSON v. MEAD, T. T. 1722, C. P. 1 Com. 371. S. P. SMITH v. MARSON, 2 Stra. 810; 2 Ld. Raym. 1541.

In trespass for an assault and battery, the defendant pleaded in abatement that he was not a gentleman, as named in the process, but a mercer. To which plea the plaintiff demurred; because he had only shown his own condition without his degree. *Per Cur.* The plea is good; for stating he is a mercer is equivalent to stating he is a merchant. Judgment for the defendant. See 1 Stra. 1. 556; 1 Com. Dig. 35.

A plea in abatement that a defendant is not a gentleman, but a mercer, is good.

IV. OF STATING THE TOWN, HAMLET, &c.*

1. CORTISOS v. MUNOZ, H. T. 1731, K. B. 2 Stra. 924, S. C. 2 Barnard, K. B. 95.

The defendant was sued by a special original, with the addition of late of London, merchant; to which he pleaded that for four years before he was resident at Whitechapel, in Middlesex; and traversed that he was a resident in London at the time of the writ. An affidavit in verification of the plea was annexed. On motion the plea was set aside, for by stat. 1 Hen. 5. c. 5. the plaintiff has his election to describe him of the place in which he lately resided; the words being *de villis et counties ou ils fueront ou sont*. See 2 Inst. 670; Hawk. b. 2. c. 23. § 119; Com. Dig. Indictment, G. 1; Bac. Ab. Misnomer, B. 4; and see the observations of Lord Kenyon, in the King v. Yardell, 4 T. R. 541.

Addition of "late of London merchant," good, the defendant be commorant in Middlesex.†

2. SHIELDS v. CUTHBERTSON, M. T. 1741, C. P. Barnes, 162.

Defendant pleaded in abatement, and traversed the inhabitancy; the plaintiff demurred, and objected that the statute of additions expresses the word conversant; that Rastall, and the old entries, are so. Indeed, some modern entries are commorant, but none inhabitant; and the objection was held good; a man may lodge in one parish and work in another; he is conversant where he works. See Bac. Ab. Misnomer, B. 4.

The place where the defendant is conversant is sufficient addition, though he be neither commorant nor inhabitant. The county as well as the parish should be stated.

3. SHELLY v. WRIGHT, H. T. 1736, C. P. Barnes, 338.

In the margin of the declaration the word Middlesex was inserted, and defendant's addition was described as late of Westminster, without saying in the county aforesaid. Defendant pleaded in abatement that it did not appear by the declaration at what place he was commorant. Plaintiff moved to set aside the plea, and obtained a rule to show cause, which was afterwards discharged. *Et per Cur.* It is not usual to set aside such pleas upon motion. Plaintiff may demur if he thinks fit. See 2 Inst. 169; Hawk. b. 2. c. 25. § 120; Com. Dig. Indictment, G. 2; Bac. Ab. Misnomer, B. 4; Arch. Crim. Pl. 9.

V. CONSEQUENCES OF A DEFECTIVE STATEMENT OF THE ADDITION, AND HOW TO BE TAKEN ADVANTAGE OF.||

1. THE KING v. SIR HENRY BOND, BART, T. T. 1697, K. B. 12 Mod. 198; S. C. 1 Lord Raym. 845; S. C. Andr. 146.

A writ of error was brought to reverse an outlawry for high treason; assign-term "husbandman" is the proper description. See 2 Inst. 668; Bro. Add. 10; Hawk. b. 2. c. 23. § 116; Bac. Ab. Misnomer, B. 3. It may be proper to add, that epithets which charge the defendant with improper or unlawful practices cannot be adopted, as maintainer, extortioner, &c. 2 Inst. 668; Bac. Ab. Misnomer, B. 3; Indictment, G. 2; Bro. Add. 8; Hawk. b. 2. c. 23. § 116; C. C. C. 35.

The omission of the defendant's addition in an indictment does not make it void, unless the defendant takes advantage of the error.

* The defendant should always be described as of the town or hamlet, or place, and county of which he was or is, or in which he is or was conversant. See 2 Inst. 669; Hawk. b. 2. c. 23. § 20; Com. Dig. Abatement. F. 25; Bac. Ab. tit. Misnomer, and Addition, B. 8; 1 Chit. Crim. Law, 208; Arch. Crim. Pl. 8.

† It is laid down that if a man be described as of A. late of B. proof of either allegation may be admitted. Hawk. b. 2. c. 23. § 119.

‡ In criminal proceedings, if the indictment does not describe the defendant by any addition of place or degree, it is defective on the face of it, and the defendant may plead in abatement. Or if the defendant be misnamed, or his addition of degree be misstated, which is an extrinsic objection not apparent on the face of the indictment, the defendant may plead this also in abatement; but for objections apparent on the face of the indictment itself,

- ing for cause that the statute 1 H. 5. c. 5. requires that every mystery, or degree, and place of abode, and that in the indictment he was not described by the title of baronet or any other sufficient addition, nor was the place of his abode stated. *Per Cur.* The defendant has an election, either to take advantage of the exception to the indictment for want of an addition, or to waive it, and plead the king's pardon; for the indictment ought not to be quashed, unless the prisoner elects to take advantage of the defect. See 4 Leon. 121; 2 Rol. Rep. 225; Kilw. 26; 1 Vent. 338; Latch. 109; 2 Stra. 1218.
- [223] **A plea that the plaintiff is a knight must state that he was so at the exhibition of the bill.** 2. LETT v. MILLS, H. T. 1701, 1 Salk. 6; S. C. 6 Mod. 105; 2 L. Raym. 1014. S. P. JEFFERTS v. SNOW, M. T. 1686. Comb. 65.
- Demurring to a plea in abatement of misaddition is an admission of its truth.** Defendant pleaded in abatement *quod suscepit ordinem militarem et jam miles existet*; and upon demurrer a *respondeas ouster* was awarded, because it was not averred that he was a knight before or at the time of the bill exhibited. 4. NASH v. BATTERSBY, T. T. 1702, K. B. 2 L. Raym. 186; S. C. 6 Mod. 80.
- Leave to amend, after plea of misaddition refused. Qu.** In debt on bond the plaintiff declared by the name of E. M. gentleman; plea, negating this fact; to which the plaintiff demurred, and held bad, because it amounts to a confession that the plea is true, and then the parties are not the same as mentioned in the declaration. He ought to have replied that he is a gentleman. See 5 Mod. 364; Skinner, 15; 1 Lutw. 238; 8 Mod. 51; Com. 371; Stra. 556; 3 P. Wms. 62; 12 Mod. 249.
- But granted to amend on information.** 4. SMITH v. MASON, M. T. 1728, K. B. 2 Ld. Raym. 1541; S. C. 2 Stra. 816. S. P. WARNER v. IRBY, T. T. 1704-5, K. B. 2 L. Raym. 1178, MASON v. BUSHELL, T. T. 1721, 8 Mod. 52.
- [224]** The defendant was sued by the addition of gentleman, and pleaded in abatement that he was a merchant, and not a gentleman. On demurrer the Court ordered the defendant to answer over, for the plaintiff has his election to sue him either by his name of degree or mystery; and this writ being brought by the addition of his degree, he ought to have shown what degree he was of, that the plaintiff might have a better writ. 5. LEPARA v. GERMAIN, E. T. 1702, K. B. 1 Salk. 50; S. C. 2 L. Raym. 859.
- When a trader is sued as a yeoman, he cannot plead he is of a particular trade, though he may show that he is of a higher degree.** Declaration against Sir J. G. knight. The defendant pleaded in abatement that he was a knight and baronet; the plaintiff replied that he was a knight, &c. A motion was made for leave to amend, but denied, because there was nothing to amend by, and the defendant had taken advantage of the fault. See Garner v. Anderson, 1 Stra. 11; Richards v. Brown, 1 Doug. 114.
6. REX v. SEWARD, H. T. 1726, K. B. 2 Stra. 739; S. C. 2 L. Raym. 1472. Information against the defendant for challenging a person to fight. The defendant pleaded in abatement that he was a surgeon, and not a gentleman, as he was styled in the information; and, upon debate, the Court gave leave to amend the information, upon payment of costs. See 1 Stra. 11; Ca. Temp. Hard. 44. 7 T. R. 698; 3 M. & S. 459; Imp. C. P. 228; 2 Arch. P. K. B. 209; 2 Tidd, 729. 7th ed.
7. HORSPOOLE v. HARRISON, T. T. 1722, 1 Stra. 556. S. P. SMITH v. MASON, M. T. 1728, K. B. 2 Ld. Raym. 1541; 2 Stra. 816.
- In an action by original, the defendant was described as of, &c. yeoman; to which he pleaded in abatement, that he was a lime merchant, and not a yeoman. Demurrer to plea. *Per Cur.* This plea is bad, and a *respondeas ouster* must be awarded. Every individual has a degree by which he may be known; and having such, if he be in business also the plaintiff has his election to sue him by his degree or by his mystery; it is not enough for the defendant to say, that he is of a particular trade, because he does not thereby give the plaintiff a better writ; the defendant should have shown himself of a degree higher than a yeoman, which would have abated the plaintiff's present without reference to any extrinsic cause, it is more usual to move to quash it, or to demur. In civil proceedings, as oyer of the writ or plaint cannot now be craved, and as it is unnecessary to insert the defendant's addition of place or degree in any declaration, (3 B. & P. 395,) no advantage can be taken in pleading of a mistake of the addition in the precipe or original, unless the misaddition be unnecessarily inserted in the declaration, in which case it might be open to the defendant to plead in abatement. See 1 B. & P. 648; 3 B. & P. 396; 1 Saund. 318, a. n. 3; 2 Saund. 209, a. n. 1; 5 Taunt. 653.

writ, and given him a better. See 8 Mod. 52; 2 Ld. Raym. 1178; Bl. Com. 302; 2 Stra. 816; Com. Rep. 371; 2 Ld. Raym. 541.

8. ROBINSON v. MEAD, T. T. 1722, 1 Com. Rep. 371.

The defendant pleaded in abatement that he was a mercer, and not a gentleman, as named in the writ; to which the plaintiff demurred. *Sed non allocatur*; for here the defendant denies absolutely the addition given him by the writ, and then, *non constat de persona*, for Thomas Mead, mercer, and not a gentleman, cannot be Thomas Mead, gentleman. It is true that the statute of 1 H. 5, c. 5, requires only that in original writs an addition shall be made of the defendant's estate, degree, or mystery, and therefore it is sufficient, where a defendant has several additions, to give him the one or the other, or to give him the addition of his degree or mystery, or both; but when the defendant has no such addition as given him by the writ, he may plead, as here, *quod non est generosus, nec suscepit, nec fuit de gradu generosi*; which the plaintiff confessed by his demurrer; and when by his plea in abatement the defendant denies the addition given him by the plaintiff, he is obliged, by the rules of good pleading to show his addition by which he might be sued; and therefore, 28 H. 6, 26, the defendant pleaded that he was a merchant, *et non generosus*, and it was holden good.

But a plea in abatement, that the defendant is a mercer and not a gentleman as named in the writ is good.

9. PERRY v. TOMPKIN, T. T. 1734, C. P. Prac. Reg. 5.

A plea in abatement had been filed for want of the defendant's addition, but without an affidavit being annexed to verify its truth. In consequence of this omission the plaintiff signed judgment. A motion was made to set the judgment aside, on the ground that the truth of the plea appeared on the face of the record. Rule to show cause granted.

Semb. plea of no addition need not be verified by an affidavit.

11. SHELLY v. WRIGHT, H. T. 1736, C. P. Barnes, 338.

Defendant pleaded in abatement, that it did not appear by the declaration at what place he was commorant. Plaintiff moved to set aside the plea, and obtained a rule to show cause, which was afterwards discharged, the Court observing that it was not usual to set aside such pleas on motion, but that the plaintiff might demur.

[225]
A plea of misaddition will not be set aside on motion, but should be demurred to.

12. THE KING v. HADDOCK, H. T. 1737, K. B. And, 138.

On arguing a demurrer to an indictment for a nuisance, an exception was taken, that the defendant's addition had not been inserted as required by the 1 Hen. 5, c. 5, but it was contended, on behalf of the plaintiff, that according to the practice of the Court, the defendant could not move to have the indictment quashed, it being for a nuisance. Lee, C. J. said, there is a great difference between the cases where there is a false addition, and where it is totally omitted; if it be a false one, it must be pleaded, because that is a matter extrinsic, and if the party has complied with the act by giving an addition, a misstatement in it cannot be taken advantage of otherwise than by plea, where the defendant must give his true name. But where there is no addition, the Court may, upon motion, quash the indictment. The question then is, whether there be any difference between a motion to quash an indictment for want of an addition, or taking an exception at the bar, (as may certainly be done,) and taking advantage thereof by demurrer; I think the defect may be taken advantage of upon demurrer, as well as *ore tenus*, at the bar. Probyn, J. was of the same opinion; but Page and Chappel, Js. differed as to the propriety of taking advantage of it by demurrer; and no final judgment was ever given. See the King v. Warren, 1 Keb. 885; 1 Chit. Crim. Law, 439. 447.

Semb. where there is no addition, an indictment may be quashed; but where there is a false addition, it must be pleaded in abatement.

13. HOLE v. FINCH, H. T. 1769, C. P. 2 Wils. 138.

The defendant had been sued by the addition of esquire, instead of doctor in physic, in the *capias*, and had given a bail bond by his right addition; the plaintiff afterwards declared against him by the addition he had assumed in the right addition. A rule was obtained to set aside proceedings, but *Per Cur.* We cannot interpose, and set aside the proceedings for irregularity; for if the defendant will take advantage of a variance between the writ and count, he must demand oyer of the writ, and show it by plea to the Court. One reason why he should not interpose is, that after the defendant has appeared, and is in by his right

Where a defendant had taken a wrong addition given him in a *capias*, but gave a bail bond by his right addition, and the plaintiff afterwards declared against him, he cannot interpose against him.

addition, the Court refused to set aside the proceedings. [226] court, there is an end to the mesne process; and if the defendant craves oyer, it must be of the original writ; he cannot have it of the mesne process. If application was to be made to the master of the rolls, he certainly would not refuse to order right originals to be made out in both these cases. See Gould v. Barnes, 3 Taunt. 504; Meredith v. Hodges, 2 N. R. 453; Smithers v. Smith, Willes, 461; Barnes, 94, S. C. Linch v. Hooke, 1 Salk. 7.

A plea that there is no addition given to the defendant, either in the writ or declaration, concluding with prayer that declaration be quashed, is a nullity.

Variance between original writ and count cannot be pleaded.

A misaddition in the affidavit, to verify a plea in abatement, is no ground for setting the plea aside. [227]

If there be an adjournment *ad quind.* Mich. *apud* Windsor; there cannot be a re-adjournment from Windsor to Westminster.

Adjournment of the sessions should be in the preter-terrace.

14. GRAY v. SIDNEFF, 43 Geo. 3 E. T. 3 B. & P. 395.

In this case no addition was given to the defendant, either in the recital of the writ, or in any part of the declaration; in consequence of which defendant pleaded the statute of additions, 1 H. 5, in abatement; and prayed judgment of the declaration, and that the same might be quashed. A rule nisi was obtained to show cause why judgment should not be signed as for want of a plea. *Per Cur.* The proper mode of procedure in this case would have been to have signed judgment, as for want of a plea, and thus have put the defendant to move to have it set aside. There is not a single case in which it has been held necessary to insert an addition in the declaration;* and according to Murry v. Hubbard, 1 B. & P. 645, advantage cannot be taken after appearance of a misnomer in the mesne process. Rule absolute. See 1 H. 5, c. 5; Bennett, v. Purcell, 2 Ld. Raym. 849; Banbury v. Wood, 1 Salk. 5; Johnson's case, 2 Roll. Rep. 225; Shelly v. Wright, Barnes, 338; Hughes v. Alvarez, 2 Ld. Raym. 1409; Cave v. Aaron, 3 Wils. 33; Murray v. Hubbard, 1 B. & P. 645.

15. DESHONS v. HEAD, E. T. 1806, K. B. 7 East, 383, 3 Smith, 363; S. C. The defendant being sued by original, pleaded in abatement, the want of an addition in the original writ, without first craving oyer of it. A rule was obtained for the defendant to show cause why the plea should not be quashed, the rule to reply discharged, and the plaintiff be at liberty to sign final judgment. *Per Cur.* Although oyer of an original writ is never granted, yet such a plea cannot be pleaded, without first craving oyer; and as that now cannot be obtained, these pleas are no longer sustainable. Rule absolute. See 5 Com. Dig. 123; Pleader, P. 2; 1 Com. Dig. 42. Abatement, H. 1; Vanderplank v. Bankes, 2 Wils. 85; Hole v. Finch, id. 395; h Saund. 318, n. 3; Boats v. Edwards, Doug. 227; Murray v. Hubbard, 3 B. & P. 395; Gray v. Sidneff, 1 id. 645; Wallace v. the Duchess of Cumberland, 4 T. R. 371.

16. BRAY v. HALLER, E. T. 1818, C. P. 2 Moore, 213.

The defendant in the affidavit, verifying the truth of his plea in abatement, described himself as of "Clifford," instead of "Clifford's Inn." A rule nisi was obtained to set the plea aside, on the ground that there was no sufficient addition in the affidavit; but *Per Cur.* The plaintiff might have considered the plea as a nullity; and signed judgment, but we cannot set it aside on this irregularity. Rule refused. Vide post, tit. Affidavit.

Adjournment. See also Inquiry, Writ of; Sessions; Trial, Notice of.

1. MEMORANDUM, H. T. 1665, K. B. S.d. 276.

A term was adjourned, except only the two last returns, to Windsor. Those two returns cannot be held at Westminster by re-adjournment, because by the first adjournment the day in court is the *quarto die post*; and consequently only a part of the return would be adjourned, which would be irregular. See 1 Com. Dig. Abatement, A. 3; 2 Vin. Ab. 112; 4 E. 4, 20; 5 E. 4, 112, 130; Dy. 186, pl. 68, 126, pl. 38.

2. THE KING v. MIDDLETON, E. T. 1654, K. B. T. Raym. 415; S. C. 1 Keb. 867, 879.

The defendant had been indicted at Guildhall, London, and the sessions there had been adjourned to the sessions at Justice-hall: the defendant was tried at the latter place, and judgment given against him. On a writ of error being brought it was assigned for cause that all the adjournments of the ses-

* In practice it is unusual and injudicious to insert the addition of the defendant in the declaration. See 1 Saund. 318, a. n. 3; 2 Saund. 299, a. n. 1.

sions were in the preter-tense. But by the Court. It is the usual course in An appearance cannot be entered as of the first return when there has been an adjournment.

3. ANONYMOUS. E. T. 1661. K. B. 1 Keb. 273.

Per Cur. Entry of an appearance as of the first return, when the term has been adjourned to another is a discontinuance.

4. MEMORANDUM. E. T. 1702. K. B. 7 Mod. 1.

The first return of this term was dispensed with by the proclamation, and the term adjourned to the second return. See 1 Sid. 276; 1 Lev. 176. 178; 1 Keb. 94. 2; 2 Keb. 76. 152.

5. WRIGHT V. CRUMP. E. T. 1702. K. B. 7 Mod. 1; S. C. Holt, 404; 2 Ld. Raym. 766.

Per Cur. If the jury of an inferior court will not agree in their verdict, the steward may adjourn the court from time to time until they agree. See post, tit. Jury.

6. BROOK V. BISHOP. H. T. 1701. K. B. 7 Mod. 152.

An exception was taken to this declaration, that it was entitled generally of Easter term; yet it appeared that the trespass was committed after the 21st of which was *quinden Pasche*. But *per Cur.* That term was adjourned by proclamation to the second return, which was the 29th of April; the declaration must refer to that day.

7. THORNBY V. FLEETWOOD. T. T. 1719. K. B. 1 Stra. 379.

On a writ of error from the C. P. the Court being divided in opinion as to the proper judgment to be entered, it was submitted on behalf of the plaintiff, that the cause should be adjourned into parliament; and in support of the propriety of adopting that course, it was contended, that causes of a civil and criminal nature have been originally commenced in parliament, is a fact too notorious to be denied; and as the parliament has taken cognizance of causes in the first instance, so they have been applied to for their direction; nay, they have interposed of their own accord, in cases where inferior courts have been divided, or thought the point too difficult for their determination. To this effect is a *dictum* of Lord Nottingham, in the Duke of Norfolk's case, where he intimates that there may be an adjournment *propter difficultatem*, out of a court of law into parliament. Bracton, lib. 1. c. 2. speaking of the stability of the English laws, that they are not altered but by parliament, has these words, "Si autem aliqua nova et inconsueta emeruerint, et quæ prius usitata non fuerint in regno, si tamen similia evenerint per simile iudicenter, cum bona sit occasio a similibus procedere ad similia. Si autem talia ponantur prius evenerint et obscurum et difficile sit eorum iudicium, tunc ponantur iudicia in respectum, usque ad magnam curiam, ubi ibi per consensum curiæ terminentur." Register 124. b. There is a writ in these words: "Quia volumus quod querela pendens inter te et C. et alios coram certis iusticiariis nostris ad hoc nuper assignatis de quadam transgressionem quam præstendis ut dicitur nobis et tibi per præfatum, C. et alios illatum fuisse coram nobis et consilio nostro apud Westmon. in quindena sancti Mich. proximo futuro discutatur et terminetur, tibi præcipimus quod sis coram nobis et consilio nostro apud Westmon. ad quindena prædict. quem diem prefato C. didimus tunc ibidem ad informandum nos et consilium nostrum super negotio prædicto, et ad faciendum et recipiendum quod per nos et consilium nostrum præd. super dictum negotio considerari contigerit tunc ibidem." 1 E. 3. 7. a.

After stating the case and what had been said upon it the book goes on; "Et puis vient breve quod si difficultas aliqua intersit le record soit mand in parlement ad adjurner les parties la 15 pas et did. fuit al vicount qui il est les deniers a meme le jours." Cotton's records, 30. Lord Coke, in 4 Inst. 68. takes notice that at common law before 14 E. 3. delays of judgment were provided against in five manners; and one of the instances he gives, is by the king's writ, comprehendum quod si difficultas aliqua intersit; the record should be certified into parliament, and to adjourn the parties to be there at a certain day. Si obscurum et difficile sit iudicium ponantur iudicia in respectum usque magnam curiam; and of this, says he, there was an excellent record

An appearance cannot be entered as of the first return when there has been an adjournment. Any of the terms may be adjourned by proclamation. An inferior court may be adjourned by the steward until the jurors agree. If a term be adjourned, the memorandum on the declaration applies to the day of the adjournment. Where the judges of the K. B. on a writ of error are divided in opinion, they have no power to adjourn the cause into parliament without the king's writ.

in the parliament holden at Westminster the Friday after the translation of Thomas a Becket. The case also of Nevil v. Stroud. 2 Sid. 168. appears to have been argued in C. P. and by them delivered into parliament, who took order therein. *Sed per Cur.* We are all of opinion that the present application cannot be granted; it would be highly presumptuous in us to adjourn the cause into parliament, without our receiving the king's writ, which the parties might have obtained for that purpose.

[229] **Adjournment Day.** See tit. Trial, Nature of.

Adjudication. See tit. Appeal.

Adjustment. See tit. Insurance.

Admeasurement. See tit. Common; Drawer.

Administration. See tit. Executor and Administrator.

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I RIGHT OF GRANTING IN WHOM VESTED.

(A) WHEN IN THE METROPOLITAN.*

[230] 1. ANON. M. T. 1561. C. P. 1 Mev. 78. S. P. TULL v. OSBERSON. M. T. 1661. Sid. 90.

Where a man dies in testate having bona notabilia in several peculiars, administration shall be granted by the archbishop of the province.

Per Cur. Where a man dies intestate, having goods in several peculiars, the granting of administration does not belong to the ordinary of the diocese, but to the metropolitan of the province, for they are exempt from ordinary jurisdiction. See S. P. 14 H. C. 21; 10 H. 7. 18; 35 H. 6. 43; 4 Burn. E. L. 189; Ra. Ent. 324; Swimb. 417; 1 Rol. Abr. 909; 4 Inst. 353; 2 Lev. 86; Cro. Eliz. 457; 1 Sid. 90; 2 Leon. 155; Hard. 216; Gilb. on Wills. 423; Gibs. Cod. 472; Swimb. p. 6. s. 11; 6 Ves. 118; Dick. 746.

* By the 92d canon, if a testator or intestate dies in one diocese, and has at the time of his death goods or good debts to the value of five pounds in any other diocese or peculiar jurisdiction within the same province, the probate of the will, on granting letters of administration, belongs to the prerogative court of the archbishop of that province; and every probate or administration not so granted, is declared void, with this proviso, that if any man die in *itineris*, the goods he has about him at that time shall not cause his will or

2. BURSTON v. RIDLEY, M. T. 1701, K. B. 1 Salk, 39; S. P. SHAW v. STOUGHTON, E. T. 1672, K. B. 2 Lev. 86; S. C. 3 Keb. 163.

Per Cur. If a man leaves bona notabilia in several dioceses of the same province, there must be a prerogative administration. If one leaves bona notabilia in two dioceses of Canterbury, and two dioceses in the province of York, there must be two prerogative administrations. See 1 Rol. Abr. 908; Swimb. 357; Hard, 216; 1 Lev. 78; Cro. Eliz. 283; Cro. Car. 703; 3 Bac. Ab. 36; Dig. 305; Gibs. Cod. 473; 2 Bulst. 4; 3 Bac. Ab. 36; 11 Vin. Ab. 76, pl. 15.

administration; where in two dioceses of each province, there must be two prerogative administrations;

3. SHAW v. STOUGHTON, E. T. 1672, K. B. 2 Lev. 86; Freem. Rep. 102, pl. 117; S. C. 3 Keb. 163.

Per Cur. If a man die, leaving goods in England and Ireland, the archbishop of the latter country must grant administration for those within his jurisdiction.

must be granted by the metropolitan of that country.

4. SHAW v. STOUGHTON, M. T. 1672, K. B. 3 Keb. 163.

Per Cur. Although where a party has goods both in England and Ireland, there must be several administrations, yet administration granted by the Court of Arches extends over all the world but Ireland and York, who have particular archbishops.

5. BOSWALL v. RAWSTORNE, T. T. 1692, C. P. Lutw. 535.

The granting letters of administration is not a judicial but only a ministerial act, because the ordinary is directed by the statute to grant it, and therefore good, though granted at York by the Archbishop of Canterbury; and on debt brought by such an administrator it was adjudged for him. See S. P. Helyar's case, 1 Jones, 284; Carter v. Crofts, Godb. 33, pl. 41; Knollis v. Dobbins, Godb. 342, pl. 437.

6. ANON, E. T. 1723, K. B. 8 Mod. 244; S. P. GOLD v. STRODE, M. T. 1689, K. B. 3 Mod. 324; S. C. Carth. 147; ADAMS v. SAVAGE, E. T. 1703, K. B. 2 Lord Raym. 855; S. C. Salk, 679; BOON v. HAYMAN, E. T. 1732, K. B. Cited 2 Selw. 748, 5th edit. KEGG v. HORTON, M. T. 1686, C. P. 1 Lutw. 401; CARLISLE v. GREENWOOD, E. T. 1701, K. B. 7 Mod. 15.

B., executor of A., proved the will in the diocese of L.; B. brought an action as executor of A. against C. and had judgment. C. was taken in execution, and escaped. B., the executor, died intestate. D. took administration cum testamento, &c. de bonis non of A., in the diocese of L. and brought debt against the sheriff for the escape. Per three justices against one. The judgment being entered in Middlesex, the party ought to have obtained a prerogative administration. See Com. Dig. Administration, B. 4; Dyer, 305, in note; Byron v. Byron, Cro. Eliz. 472.

7. YOUNG v. CASE, T. T. 1689, K. B. 1 Lutw. 30.

Upon suspension of the archbishop, administration was granted by the dean and chapter, and held good. See Jenk, 207, pl. 23, cites 36 H. 8; Br. Cases, 276.

tration by the dean and chapter, on the suspension of the archbishop, is valid.

8. HILLIARD v. COX, E. T. 1698, K. B. 1 Salk, 37; S. C. 1 Ld Raym. 562.

In debt by an administrator on an administration committed *per episcopum*, L. &c. defendant pleaded in bar that the intestate, *tempore mortis*; was resident in another diocese, and it was held good upon demurrer. *Per Cur.* Simple contract debts are personal, and administration must be committed of them where the party dies.

administration to be liable to the prerogative court. And by the 93d canon, "goods in different dioceses, unless of the value of five pounds, shall not be accounted bona notabilia;" with this proviso, "that this shall not prejudice those dioceses where, by custom or composition, bona notabilia are rated at a greater sum."

Where there are bona notabilia in one diocese of Canterbury and one of York, the bishop of each diocese must grant an administration; Or if the intestate have goods in Ireland, administration

Administration, granted by the metropolitan extends all over the world. Administration may be legally granted though the officer at the time of the grant be not within his jurisdiction. Judgments are bona notabilia at the place where they are recorded; hence judgment has been recovered at Westminster, a prerogative administration is necessary. Adminis

Simple contract debts are personal, and administration must be granted where the party dies. Qu.

9. YEOMAN v. BRADSHAW, E. T. 1669, Carth. 373; S. C. 3 Salk. 70, 164; Comb. 392.

Debts upon simple contract are bona notabilia where the debtor resides.

This was an action on a bill of exchange, brought by the plaintiff, as administratrix of her late husband, against the drawer; the bill was drawn in London. The defendant cravedoyer of the letters of administration, which had been granted by the Bishop of Durham. Upon demurrer, it was insisted that a bill of exchange was only a simple contract debt, and consequently followed the person of the debtor, wherever he might be, and that the right of granting administration belonged to the ordinary of the place where the debtor was at the time of the death of the intestate, and that the administration was void; and adopting this opinion, the Court gave judgment for the defendant. See Bac. Ab. tit. Executor, E, 2; Com. Dig. Administrator, B, 4.

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As where administration was granted in a peculiar, and to an action brought against a person, he pleaded at the time of the death of the intestate he resided out of the peculiar.

10. HILLIARD v. COX, E. T. 1699, K. B. 1 Lord Raym. 662; S. C. 1 Salk. 37. In indebitatus assumpsit by an administrator for goods sold and delivered by the intestate on an administration committed by the Archdeacon of Berkshire; the defendant pleaded in bar that he the defendant,† at the time of the death of the intestate, was an inhabitant and resident in the city of Oxford, which was within the diocese of Oxford, and that the archdeaconry, and whole county of Berks, were within the diocese of Salisbury. On special demurrer, because it did not appear that the defendant was not an inhabitant within the diocese of Salisbury, the Court overruled the demurrer, and adjudged the plea to be good; and by Holt, C. J. If the debtor has two houses in several dioceses, and at the time of the death of the debtor and commission of administration, is inhabitant and resident at one of the houses, that will exclude the jurisdiction of the ordinary of the diocese in which the other house stood. This was held a good plea; for the residence of the debtor out of the peculiar or diocese constituted bona notabilia. If the debtor has two houses, the defendant will be bonum in that in which he resided at the time of the death.

11. GRIFFITH v. GRIFFITH, E. T. 1755, C. P. Sayer, Rep. 83.

When an intestate dies beyond sea, administrations are to be granted in the diocese where the property is at his death.

In debt by an administrator, it appeared that the letters of administration were granted by the Bishop of Bristol. Plea that the plaintiff's intestate died on the high sea, out of the jurisdiction of the Bishop of Bristol; and that therefore the letters of administration were void. On demurrer it was holden that the letters of administration were good; for the right of granting them is not founded upon the dying of an intestate within a diocese, but upon his leaving property therein. See Roll, 908; Bac. Ab. 35; Toller, 53.

(B) WHEN IN AN INFERIOR JUDGE.†

1. ADAMS v. SAVAGE, E. T. 1702, K. B. 2 Lord Raym. 854; S. C. 6 Mod, 134; S. C. cited per Cur. 8 Mod, 245; and S. H. Anon, E. T. 1723, Exch. 8 Mod, 244.

A bishop or inferior judge, can not grant administration of a judgment in the superior courts at Westminster.

Grant of administration by the Archdeacon and Dorset is void quoad a judgment of B. R. for the judgment of that court, is bona notabilia; and if it will not make bona notabilia, yet such a grant of administration will be void quoad the judgment, because it is out of the jurisdiction of the Archdeacon of Dorset. And per Holt, C. J. This Court will take notice of the limits of ecclesiastical jurisdictions, which is part of the law of the realm under which we live; and consequently it will take notice, that a judgment of the King's Bench is not within the jurisdiction of the Archdeacon of Dorset; and for this reason the whole Court held, that judgment ought to be given for the defendant. Vide ante, p. 231.

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Though in a prior case the contrary has been determined.

2. ATKINSON v. NEWTON, M. T. 1684, K. B. 2 Show, 437.

A. obtained a judgment against J. J. in B. R. and died; B. as administrator. On this point the law makes a distinction between debts by specialty, and debt by simple contract. It regards debts by specialty as the deceased's goods in that diocese where the securities are found at the time of his death, although they were entered into another, or the debtor or creditor, at the time when they were executed, lived in a different diocese. 3 Bac. Ab. 37; Roll. Ab. 909; Shep. Touchstone, 463.

† In Salk. 37, the plea is represented to have been, that the intestate, at the time of his death, was resident, &c. but that statement appears from the pleadings in Salk. 750, and 3 Ld. Raym. 306, incorrect; and so Lee, C. J. considered it in Griffith v. Griffith, Say. 85.

‡ If an intestate has not bona notabilia, administration shall be granted by the bishop of the diocese where he dies; or if he dies within a peculiar, by the judge of the peculiar jurisdiction. Toller, 50.

to A. brought a *scire facias* on the judgment, and alleging that administration had been granted to him by the archbishop of York. It was argued that this administration was void, by reason of the judgment in Middlesex, which is *bona notabilia* in another diocese; and though the objection is taken after verdict, yet here it appears on record that he had *intabilia* in Middlesex, and *non constat* that he had any at all in York. But upon further argument, the Court thought it well enough, and gave judgment for the plaintiff. But the reporter says *quære lanem*.

3. HILLIARD v. COX, E. T. 1699, K. B. 12 Mod. 376; S. C. 1 Salk. 37; 1 Ld. Raym. 562.

A. has two houses in several dioceses, and lives mostly at one of them, but sometimes at the other, and being there for a day or two, dies; administration of his personal estate shall be granted by the bishop of his diocese, for he was commorant there, and not there as a traveller. See 4 Burn. Eccl. L. 191; 3 Bac. Ab. 36; Roll Ab. 909; 4 Burn. Eccl. L. 189; 11 Vin. Ab. 80.

4. ADAMS v. THE TERRE TENANTS OF SAVAGE, E. T. 1701, K. B. 6 Mod. 134; S. C. 1 Salk. 40; 2 Ld. Raym. 854.

Per Cur. Archdeacons, as such, have no power to grant administrations, though most in England do it, but not *quatenus* archdeacons, but by prescriptive right, and sometimes they do by peculiars, and sometimes by themselves.

(C) RIGHT OF GRANTING, HOW TRIED.—And see post, tit. Prohibition.

1. SIR RICHARD RAINS v. THE COMMISSARY OF THE DIOCESE OF CANTERBURY, H. T. 1701, K. B. 7 Mod. 1417.

R. a seaman, died beyond sea; the place of his habitation while in England was Sandwich, within the diocese of Canterbury, and he had *bona notabilia* in other dioceses within the province of Canterbury. The commissary of the diocese committed administration to the wife, and a creditor of the intestate cited the widow in the prerogative court to obtain a repeal of the administration. A prohibition was moved for, but it was ultimately proposed, as an expedient, to try the question, that Sir R. R. should bring an action of *assumpsit* against the commissary for granting a prerogative administration, to the prejudice of his jurisdiction, or that he should bring an *indebitatus assumpsit* for the fees, as for money received to his use. See *Aris v. Stukely*, 2 Mod. 260; *Howard v. Wood*, 2 Lev. 245; *Saunderson v. Bignoll*, 2 Stra. 748; *Stockhold v. Collington*, Salk. 330; *Mayor of Exeter v. Tremlet*, 2 Wils. 95; *Steward v. Baker*, 1 T. R. 618; *Powel v. Milbank*, 1 T. R. 399. n; 2 Bl. Rep. 851. S. C.; *Boyter v. Dodsworth*, 6 T. R. 681; *Rex v. Bingham*, 2 East, 311.

II. RIGHT OF OBTAINING, IN WHOM VESTED.*

(A) WITH REFERENCE TO THE RIGHT OF HUSBAND AND WIFE.†

1. COX v. WEBB, T. T. 1693, K. B. Comb. 289; S. P. ANON. H. T. 1690, K. B. 12 Mod. 16.

Per Holt, C. J. If a man die intestate, having a wife, the ordinary may grant administration, either to the wife or next of kin, at his election; but if the

* Formerly upon the death of a person without making either will or executor, the king effects of the wife, as was entitled to his goods, as the *parens patriæ*, and general trustee of the kingdom. 9 Co. 38. This prerogative was afterwards vested in the ordinary. Peck, s. 496; but the statute of Westm. 2, 13 Edw. 1, c. 19, enacted that the ordinary shall be bound to pay the debts of the intestate, so far as his goods will extend; and the power over the residue was at length taken away by stat. 31 Ed. 3, c. 11, which provides, that in case of intestacy, the ordinary shall depate the nearest and most lawful of the deceased's friends (who are interpreted to be the next of blood, that are under no legal disabilities; 9 Co. 39.) to administer his goods, which administrators are put upon the same footing with regard to suits, and to accounting, as executors appointed by will. The stat. 21 Hen. 8, c. 5, authorizes the ordinary to grant administration either to the widow or the next of kin, or to both of them at his own discretion; and where two or more persons are in the same degree of kindred, gives the ordinary his election to accept whichever he pleases.

† The ordinary is compellable to grant administration of the goods and chattels of the wife to the husband or his representatives. Cro. Car. 106; Stat. 29; Car. 2, c. 3; 1 Plowd. 331; 11 Vin. Abr. 86; for an account of the diversity of opinion formerly entertained upon this subject, see Toller, 80, 83.

If an intestate has several houses and dies at one of them, administration shall be granted by the bishop of that diocese, though he generally lives at the other; otherwise if he dies on a journey. Archdeacons have only a prescriptive, and not a common, right to grant administrations. The right of granting administration may be tried in an *indebitatus assumpsit* for fees. [234]

The ordinary may elect either to grant administration to the intestate's widow or next of kin; but of the effects of the wife, as the ordinary must be granted to the husband.

wife die intestate, the husband must have the administration, and none else. See note,† and *supra* *Fawtry v. Fawtry*; and *Webb v. Needham*, 1 Addams. 494.

2. *THE KING v. BETTESWORTH*, H. T. 1730, K. B. 2 Stra. 891.

Even altho' it be agreed before marriage that she should have power to make a will. On a *mandamus* to grant administration to John C. of the effects of Joan his wife, the return was, that by articles before marriage it was agreed that the wife should have power to make a will, and dispose of her leasehold estate; that, pursuant to this power, she made a will, and named her mother executrix, who had duly proved the same. On this return it was objected that she might have *choses* in action not covered by the deed; and that the husband was entitled to administration in respect to them, though equity would control his authority in respect to the leases. The Court allowed the objection, and granted a peremptory *mandamus*; observing, that in appointing an executor, the wife had exceeded her power. See 4 Burn. Ecc. L. 891; 11 Vin. Ab. 87; Prec. Ch. 480; Gilb. Eq. Rep. 143.

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3. *REX v. DR. BETTESWORTH*, T. T. 1738, K. B. 2 Stra. 1111; S. C. 2 Barnard, K. B. 420.

Unless the husband has parted with all his interest in his wife's property;

On a return to a *mandamus*, by the Dean of the Arches, it appeared that, by articles before marriage, the husband had agreed that the wife should have power to make a will, and dispose of her whole estate; and although, strictly speaking, she made no will, but rather an appointment, capable of operating only in equity, the Court held that it was for the spiritual jurisdiction to determine to whom to grant administration, and refused to interpose in favour of the husband. See 4 Burn. Ecc. L. 232.

4. *THE KING v. BETTESWORTH*, M. T. 1739, K. B. 2 Stra. 1118.

Or done some other act to exclude himself, he is entitled to administration, tho' the wife has a separate estate and has made a will.

On a motion for a *mandamus* to grant administration to the husband of a *feme covert*, it was returned that the wife's mother, having by her will given her effects for her separate use, exclusive of the husband, and to be by her disposed of as she should think fit; that she had made a will, whereby she devised her separate estate to trustees, with whom the husband was now litigating the validity thereof in the ecclesiastical court; pending which suit, the Dean of the Arches could not grant administration. *Per Cur.* This is an insufficient return; for here is no act of the husband's to express his assent to her making a will; and she may have *choses* in action, or other rights, besides what are included in her mother's will; in these cases there must be some act done by the husband to exclude himself, which not being pretended in this case, there must be a peremptory *mandamus*. See 2 Stra. 1117.

5. *FAWTRY v. FAWTRY*, M. T. 1699, K. B. 1 Salk. 36; S. C. 1 Show. 351; S. C. Holt, 42; S. P. *ANON.* T. T. 1722, K. B. 1 Stra. 552.

Administration may be granted in part to the wife, and in part to the next of kin;

H. died intestate, leaving a wife and a brother; the ordinary had granted the administration of some particular debts to the brother, and of the residue to the wife. The Court was moved for a *mandamus* to grant administration of the whole to the wife. *Per Cur.* Where the husband dies, the ordinary has an election either to grant administration to the wife or next of kin. This rule is grounded on stat. 21 Hen. 8. c. 5; yet even in that case she shall have her share according to the statute of distributions. But where the wife dies, administration must be granted to the husband, by stat. 31 Edw. 3. The ordinary may grant administration to the brother as to part, and to the wife for the rest; but if the intestate leave a bond of 100*l.* the ordinary cannot grant administration for 50*l.* to one person, and 50*l.* to another, because this is an entire thing. See 1 Vent. 414; 2 Stra. 891; Comb. 289; 1 Vern. 315; Stra. 552; 1 Sid. 409; Raym. 93; Cro. Car. 106; Jones, 175; Hetley, 135; Sid. 101.

6. *SANDS' CASE*, H. T. 162, K. B. Raym. 93; S. C. Sid. 179, Cited in BLACKBOROUGH v. DAVIS, 12 Mod. 668.

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Or it may be granted to the father or other next of kin, and not to the wife.

The eldest son of Sir G. S. having died intestate, his wife surviving him, administration was granted by the Prerogative Court to Sir G. S. as the next of kin; the wife applied to the Ecclesiastical Court to repeal the letters of administration, and to grant them to her; Sir G. S. moved for and obtained a prohibition; and the Court resolved, that by stat. 21 Hen. 8. it is of the election of the ordinary to grant administration to the wife or to the next of kin,

7. *WILSON v. DRAKE*, H. T. 1673, C. P. 2 Mod. 20.

A *feme sole* had several debts owing to her by specialty; she married; and the bonds not being put in suit during the overture, she died, and her husband administered. The brother of the wife applied for a prohibition, but it was refused; the Court observing that a married woman can never die intestate within the meaning of the statute, 22 Car. 2. c. 10; because it ordains that the ordinary shall take a bond of the administrator if it appear that the deceased made any will, which a *feme covert* cannot do without the consent of her husband; therefore she is not a person dying intestate within the intent of this law.

If a *feme sole* have debts due by specialty and dies, the husband shall have administration.

A *feme covert* cannot administer without her husband's permission.

8. *THRUSTOUT ON D. NEVICK v. COPPIN*, H. T. 1771, C. P. 2 Bl. Rep. 802.

Per Cur. A *feme covert* cannot administer without the consent of her husband.* See 2 Hen. 7. 15; 1 Salk. 305; 1 And. 117; Cro. Eliz. 278; Cro. Jac. 318.

(B) WITH REFERENCE TO THE RIGHT OF OTHER KINDRED.†

1. *SMITH v. TRAY*, H. T. 1675, C. P. 1 Vent. 307. 316. 320; T. Jones, 93; S. C. 2 Mod. 204; S. C. 1 Mod. 309; S. C. 1 Eq. Ab. 249; S. C. Prem. 288. n.; 3 Keb. 610.

The half blood are equally entitled to administration with the whole blood.

On a motion for a prohibition, the question was, whether brothers of the whole and half blood were of equal degree; after several arguments, the Court determined in the affirmative. See Al. Rep. 36.; 1 Mod. 209; 2 Lev. 173; 2 Vern. 50; 1 Vern. 403; Carth. 51; Fitz. 126; 10 Mod. 442; 12 Mod. 409; Gilb. Eq. Rep. 187; Com. Rep. 3; Ca. Temp. Talb. 251; 1 P. Wms. 25; 2 P. Wms. 344; Stra. 455; Ld. Raym. 86; 2 Bac. Ab. 429; Sid. 370; Vin. Abr. 911; Com. Dig. Administration, B. 6.

[237] Therefore the brother of the half blood will exclude the uncle of the whole blood.

2. *COLLINGWOOD v. PAGE*, H. T. 1670, Vent. 425.

Administration must be granted to the brother of the half blood, and not the uncle; for he has the immediate blood of the father, which the uncle has not. *Per Hale*, C. J.

3. *COPPLESTONE v. COPPLESTONE*, T. T. 1683, K. B. 2 Show 307. *semb. S.*P. *TAYLOR v. AMES*, E. T. 1582, K. B. 2 Show. 285.

A *mandamus* was prayed to the Ecclesiastical Court, to compel the granting of letters of administration to the father, the sister of the deceased having applied to the Spiritual Court for that purpose; and granted: for the father shall be administrator to his son before the sister. See 1 Salk. 32. 251; 3 Co. 40; 2 Vern 125; Prec. Chan. 527; 11 Vin. Ab. 91. 91; 2 Bl. Com. 504.

A father is entitled to administration of his son's effects in preference to his sister;

4. *BLACKBOROUGH v. DAVIS*, H. T. 1760, K. B. 12 Mod. 623; S. C. 1 Salk. 38. 251; S. C. Holt, 43; S. C. 1 Ld. Raym. 684; S. C. 1 P. Wms. 41; 1 Com. Rep. 56. S. C.

Per Holt, C. J. By our law, administration is to be committed to father or mother of the intestate in preference to his brother or sister, because the child proceeds immediately from the parent, and is otherwise of no kin to brother and sister than as they proceed from the parent; and if then the mother be nearer of kin than the sister, by 21 Hen. 8. c. 4. she ought to have

Or a mother preferable to brother or sister;

* The reason assigned for this rule is, that the husband is required to enter into the administration bond, which she as a married woman is incapable of doing. But if it can be shown by affidavit that the husband is abroad, or otherwise incompetent, a stranger may join in such security in his stead.

† Among the kindred those are to be preferred that are the nearest in degree to the intestate; but of persons in equal degree, the ordinary may take which he pleases. The nearness of propinquity of degree is reckoned according to the computations of the civilians; according to which the intestate himself is the *terminus a quo* the several degrees are numbered, and not the common ancestor, according to the rule of the canonists. Prec. Ch. 593. And therefore, in the first place, the children; or, on failure of children, the parents of the deceased, are entitled to the administration, both which are in the first degree; but with us the children are allowed the preference. Godolph. p. 2. c. 34. § 1; 2 Vern. 125. Then follow brothers; Grandfathers; Prec. Ch. 527; 1 P. Williams, 41. Uncles or nephews; Atk. 425, and the females of each class respectively; and lastly, cousins. The half blood is admitted to the administration as well as the whole; for they are of the kindred of the intestate, and only excluded from inheritance of land upon feudal reasons. See Toller, 87, and the Table of Consanguinity, p. 90; Wood's Inst. 574; 11 Vin. Ab. 26, *at supra*,

Or grand mother to niece or aunt;

Or brother and sister to grandmo ther.

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Among per sons of equal de grees, the ordinary has the power of making his election.*

the preference of administration; and by the same reason that the mother is nearer than the sister, the grandmother being nearer to the mother than her own sister, the grandmother must be nearer to the niece than the aunt; and the words "next of kin," in the statute of 1 Jn. 2. c. 17. shall be construed in like manner as in that of 21 Hen. 8. c. 5. The brother and sister of the deceased must come in before the grandmother, and the aunt before the great-grandmother; and if administration were granted to the aunt, and they went about to repeal it below, in order to grant it to the great-grandmother, it were fit to prohibit them; for by the statute they are bound to confine themselves to degrees. See 11 Vin. Abr. 93, and note; Com. Dig. Administration, B. 6; 2 Bl. Com. 505.

5. BLACKBOROUGH v. DAVIS, E. T. 1760, K. B. 1 Salk. 28. S. P. ANON. H. T. 1590, K. B. 12 Mod. 16.

Per Cur. The ordinary may grant administration to which he pleases of kindred in equal degree. See Com. Dig. Administration, B. 6; 11 Vin. Abr. 114.

III. OF THE ACTS OF THE PARTY ENTITLED PREVIOUS TO OBTAINING A GRANT OF ADMINISTRATION.

1. WHITEHALL v. SQUIRE, E. T. 1689, K. B. 1 Salk. 295; S. C. 3 Mod. 276; Skinner, 274; S. C. 3 Salk. 161; Holt, 45. S. C.

Trover, by the administrator of J. M. for a gelding, the jury found a special verdict, viz. that J. M. was possessed of the animal, and put him with the defendant to pasture, and died intestate; that before the administration was granted the plaintiff desired the defendant to bury J. M. decently, who accordingly buried him and laid out 93*l.* therein, whereon the plaintiff agreed that defendant should have the horse in satisfaction of funeral charges, and for 13*l.* residue thereof gave him his note; afterwards the plaintiff took out administration, and now brought an action of trover for the horse.

Per Holt, C. J. This action is maintainable, for the defendant was a *tort* executor; and the plaintiff's consent, when he had nothing to do with the matter, would not alter the case; for if he had then released, yet he might have taken administration and brought an action afterwards; but Dolben and Eyre, Justices, dissented, and the defendant had judgment. See 2 T. R. 97; Cro. Eliz. 377; Stra. 97; 2 Roll. Abr. 554.

2. WANKFORD v. WANKFORD, M. T. 1697, K. B. 1 Salk. 303.

Per Cur. A party entitled to administration has no power till the administration has been committed; till then he cannot bring an action. See 1 Rol. Abr. 917; 11 Vin. Abr. 202; 4 Burn. Ecc. L. 241.

3. ANON. T. T. 1696, K. B. Comb. 451.

Per Holt, C. J. If a widow, after the death of her husband, seize his goods without obtaining letters of administration, although she afterwards dispose of them by will or otherwise, yet the taking out letters of administration to the husband may bring trover for these goods, for an administrator may have trover for goods taken after the death of the intestate, and before administration committed; and although he declares of goods taken out of his own possession, whereas they were taken before he was administrator, yet it is well enough, for the administration shall have relation to the death of the intestate. See S. P. 2 Roll. Ab. 399. (A) pl.

IV. OF SPECIAL AND LIMITED ADMINISTRATIONS.

(A) DURING THE MINORITY OF EXECUTORS, OR PARTY ENTITLED TO ADMINISTRATION.†

* A party, although otherwise entitled, may be incapable of the office of administrator on account of some disqualification in point of law. The grounds of incapacity are numerous, and include almost every species of legal disability; as attainder of treason or felony, outlawry, excommunication, popish recusancy, imprisonment, absence beyond seas, bankruptcy; but coverture is no incapacity, nor is alienage, if the party come here with a safe conduct, or is commorant here by the king's licence, and under his protection, although he come without a safe conduct. See Com. Dig. Administration, B. 6; 4 Burn. Ecc. L. 233; 11 Vin. Abr. 94.

† It has indeed been held that a party before administration may file a bill in Chancery. See *Humphreys v. Humphreys*, 3 P. Wms. 351; Barnardist. 320; 4 Burn. Ecc. L. 241.

‡ See the form of this administration in Prince's case, 5 Rep. 296.

An administrator can not bring trover for a chattel after having consented to the defendant's having it before administration granted.

A party can do no act until letters of administration have been granted.†

If a man die possessed of goods and a stranger takes and converts them to his own use, and afterwards administration is granted to J. S., J. S. may maintain trover for the conversion before administration granted to him.

ENBRIN V. MOMPESSEY, H. T. 1670, K. B. 2 Lev. 37.

Administrator *durante minore ætate* of J. S. obtained judgment and brought a *scire facias* against the bail, who pleaded that J. S. the executor, was now of full age. Whereupon the plaintiff demurred, and adjudged no plea, because the recognizance entered into by the bail was to the administrator himself by name, though he had administration *durante minore ætate tantum*, and the infant coming to the age of seventeen years does not hinder the plaintiff from suing the *scire facias* against them. But per Hale, C. J. If he had taken execution upon the principal judgment after the infant came of age, it would have been a doubt if the defendant ought to be sued by him or by the infant. See 1 Sid. 57; 1 Mod. 174; 5 Co. 29; Cro. Car. 516; Cro. Eliz. 502; Godb. 104; 1 Roll. Ab. 526.

2. BROOKING V. JENNINGS, E. T. 1673, C. P. 1 Mod. 174.

Per Cur. When an infant executor comes of age, the power of an executor *durante minore ætate* ceases, and the new executor is then liable. If the former executor wasted, the new one has his remedy against him, but he is not liable to other men's suits. Anonymous, And. 34 pl. 86; Cro. Eliz. 43, 6 Co. 18; Cro. Eliz. 459; Dyer, 339; Roll. 921, pl. 86; 3 T. R. 587; Palmer v. Litherland, Lat. 160; Noy, 86.

ROCKELLY V. GODOLPHIN, H. T. 1681, K. B. T. Raym. 483; S. C. Skin. 214; S. C. 2 Show. 403.

This was an action of debt on bond against an administrator *durante minore ætate*, who pleaded that the testator had sealed a bond with a penalty of 6000*l.* conditioned to pay 300*l.* to his wife, if she survived him, within six months after his decease; and that she was wife and administratrix; and that she had assets to one thousand pounds, *et non ultra*; and that these assets she retained in satisfaction of the said debts, *et petit judicium*. The plaintiff demurred. *Per Cur.* The plea is good, for an administrator *durante minore ætate* may retain assets to pay a bond given by the intestate to trustees conditioned to pay the administratrix so much money, if she survived him. See 1 Com. Dig. Administration, F; 1 Cro. 372; Hob. 10; Fitzh. tit. Car. 188; 14 Hen. 4, 25, 35, 31; 4 T. R. 6, 40; 1 And. 24; Dyer, 2, Moor, 2.

4. LITTLE V. PLANT, M. T. 1685, C. 1 Lutw. 20.

To debt on bond against an administratrix, she pleaded that she is administratrix *durante minore ætate*, to which the plaintiff demurs specially, and joins therein. And the Court awarded a *respondens ouster* against the defendant, for want of the averment in her plea of *hoc parata est verificare*.

5. SPARKES V. CROFTS, M. T. 1691, K. B. Comb. 465; S. C. Carth. 432; S. C. 1 Ld. Raym. 265.

In an action against the defendant as administrator generally to J. S. the defendant pleaded in abatement that he was administrator during the minority of his wife, to which the plaintiff demurred. *Per Cur.* The defendant shall answer over. For though a man cannot charge an administrator during minority generally as administrator, because he is a particular kind of administrator, and where a man has obtained judgment against such administrator if afterwards the administrator or executor comes of age, a *scire facias* lies against him on this judgment; yet the defendant ought to aver that he continues administrator during the minority, which he has not done here; for he had not said that his wife was living, and under the age of 17, (5 Co. 29, Pigott's case.) Afterwards the defendant pleaded that administration was committed to him during the minority of his wife, and that his wife died since the last continuance.

6. ATKINSON V. CORNISH, E. T. 1697, K. B. 12 Mod. 194; S. C. 5 Mod. 395; S. C. Ld. Raym. 338; S. C. Comb. 475; S. C. Carth. 446; S. C. Holt, 43.

This was an action against the administrator of J. S. during the minority

* But now by the stat. 38 Geo. 3, c. 87, § 6, reciting that inconveniences had arisen from granting probates to infants under the age of 21, it is enacted, "that where an infant is sole executor, administration with the will annexed, shall be granted to the guardian or such other person as the spiritual court shall think fit, until such infant shall attain the age of 21 years."

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An administrator *durante minore ætate* may sue out a *scire facias* against bail though the infant be of age. After the determination of the power of an executor *durante minore ætate* he is not liable to be sued except for waste.

An administrator *durante minore ætate* may retain assets to pay a bond given by the intestate to trustees, commissioned to pay the administratrix a sum of money if she survived him.

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A plea of *durante minore ætate* by an administratrix is bad unless she conclude with "*hoc parata est verificare*"
A plea in abatement that defendant is an administrator *durante minore ætate* must aver that he continues so.

Administration during the minority terminates upon the executor's

attaining
the age of
seventeen.

of A. B. and C. administrators of J. S. with the will annexed; the declaration averred that A. was within the age of twenty-one years. The defendant pleaded that he was of the full age of twenty-one years, whereon the plaintiff tendered issue, and the defendant demurred. Per Holt, C. J. The difference is, if administration be granted during the minority of an executor, the administration ceases when the executor obtains the age of seventeen years; but if the administration be granted during the minority of the person who is not executor, but only administrator, the administration does not cease till the administrator attains the age of twenty-one years; therefore judgment for the plaintiff.

7. REEK v. THOMAS, E. T. 1700, K. A. 12 Mod. 500; S. C. 1 Ld. Raym. 667; S. C. 1 Com. 110; S. C. 1 Salk. 39, S. P.

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In an action of debt on a bond by an administrator *durante minore estate* of D. S. the declaration averred that D. S. was under 21 years of age. The defendant demurred to the declaration; and *Per Cur.* An administrator during the minority of the party he represents may act and sue till the administrator in whose right he officiates has attained the age of 21 years, for administrators are by the statute, and he is not a legal person in the eye of the law, capable to act for another as trustee, till 21. The expression during the minority of an administrator must be understood during legal minority; i. e. under 21, before which age he is not by judgment of law fit for the trust;† otherwise where it is the act and judgment of the party, as where one is appointed executor; for, according to the provisions of the spiritual law, he may be an executor at 17, and hence an administration during the minority of an executor ceased at that time. See 6 Mod. 306; Cro. Car. 516; 5 Co. 29; Comb. 475; Sid. 47; 5 Mod. 395; 2 Lev. 37; Roll. Abr. 910; 1 Leon. 74; Skinner, 1656; 3 P. Wms. 79; 1 Com. Dig. Administrator, F; 5 Com. Dig. Pleader; 2, d. 11.

8. JOYNER v. WATS, E. T. 1675, K. B. T. Jones, 48, S. P. BENNET v. BAUD, E. T. 1663, K. B. Sid. 185.

If there be
several in-
fant execu-
tors, he who
first attains
the age of
21 years
shall prove
the will,
and the ad-
ministra-
tion shall
cease.‡

The plaintiff declared as administrator during the minority of six, and showed that five were under 17, and that the sixth had attained the age of 18; upon the defendant's demurring, it was contended that the declaration was good, notwithstanding Piggot's case, 5 Co. 29, for that decision was founded on the practice of the judges of the spiritual law then in use. But now by the statute 22 & 23 Car. 2, c. 11, the law is altered in this point, and no administration can be granted unless to persons of 21 years of age; for the statute requires a bond to be given by the administrator, which cannot be executed by an infant. But the Court, on the contrary, held the administration to be determined, and that the statute had not altered the law in this respect. See 1 Leon. 74; 3 Keb. 607, 643; 4 Burn. Eccl. L. 240; 1 Com. Dig. Administrator, F. 1.

9. FOXWIST v. TREMAIN, T. T. 1668, K. B. 1 Mod. 47, 72, 296. S. P. HATTON v. MASCAL, E. T. 1665, 1 Lev. 181; S. C. Keb. 150.

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Where one
of two ex-
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full age, ad-
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Administration *durante minore estate* cannot be granted if any of the executors are full of age. Per Twisden, J. See Brownl. 46; 9 Co. Rep. 37; 1 Saund. 291, g; 2 Saund. 209, §12.

* Before the statute of Edw. 3, there was no administrator *durante minore estate*, except in cases where an infant was made executor. Arg. in Grandison v. the Countess of Dover, Skin. 155.

† Another and more forcible reason is assigned for this distinction, that as the statute of distributions requires administrators to give a bond, which an infant is incapable of doing, and is on that account incompetent. See 11 Vin. Ab. 100, 101; 3 Bac. Ab. 73; Co. Lit. 86, b. note 6.

‡ But administration granted during the minority of several children will not expire on the marriage of one of them to a husband of full age. Nor if an infant be an executrix shall it be determined by her taking a husband who is of age. Nor if there be several infants, by the death of one of them. Jones v. Strafford 3 P. Wms. 79, *Semb.* overruling Bradenel's Case, 5 Co. Rep. 296; Com. Dig. Administrator, E.

|| Actions, however, must be brought in both their names, otherwise the suit will abate. See Brown, 101; and references to Foxwist v. Tremain.

10. COLBORNE v. WRIGHT. H.T. 1769. K.B. 2 Lev. 240; S.C. Wm. Jones, 119. Administration shall in such cases be granted to the one executor during the minority of the other.

Per Cur. Where one of the executors is an infant, and cannot prove the will, administration *durante sua minoritate* may be granted to the other, who shall bring the action alone; and it is not inconsistent that he shall administer in such a case, for this is not granted as upon a dying intestate (for the will is proved), but only to enable him to sue alone, because the other is not capable to prove the testament, and so not join with him, and he cannot sue alone.

In Jones' report of this case, it is stated that he thought no judgment was actually given. See Bac. Ab. 13; Yelv. 130; 11 Vin. Ab. 97, 98, 99. *Semb.* not law.

11. LORD GRANDISON v. COUNTESS OF DOVER. M. T. 1981. K. B. 3 Mod. 23; S. C. Skinner, 155. *Semb.* An administrator *durante minore etate* has no power over the real estate.*

On a motion for a prohibition, it appeared that Charles Haveningham died intestate, leaving a sister an infant, whose great grandmother was assigned her guardian; and thereupon she obtained administration *durante minore etate*. The plaintiff in the prohibition, who was the grandfather of the infant, suggested that the Court had granted the administration by surprise; and he being nearer of kin prayed that the administration might be granted to him. *Semb.* That if administration be granted to A. *durante minore etate* of an executor, and the latter dies prior to his coming of age, the residuary legatee may have the grant repealed and committed to him.

It was urged that it was not material who was appointed administrator; for it being *durante minore etate*, he has no power over the estate; that since the ordinary has no original powers in this case, and this being a special kind of administration, when he has once executed the power he shall not repeal it; and the court inclined to this opinion.

12. DUBOIS v. TRANT, M. T. 1700, K. B. 12 Mod. 346.

Administration being committed to one during the minority of an executor, the question was, whether, on his dying under age, it might be repealed, and committed to his residuary legatee? *Per Cur.* Where there is an executor under age, if there be legacies, the residuary legatee ought to have administration during the minority, and not the next of kin to the intestate; because by stat. 31 Edw. 3. it is directed to be committed to the next friend of the intestate; and the appointment of a person as residuary legatee is a manifest indication that the testator considered the party thus favoured to be his next friend. See 4 Burn. Ecc. L. 236; 1 Com. Dig. Administrator, B. 8; 6 Com. Dig. Prohibition, G. 18; 2 Bac. Abr. 410.

13. MAJOR v. PECK, M. T. 1690. C. P. Lutw. 338. [243]

The administrator *de bonis non durante minore etate* of Rebecca Wood, brought an action of covenant against the husband and wife, who was executrix of the former husband, &c. averred that Rebecca was under age; the plaintiff demurred; but it was never argued, for he could not maintain it, the plea being clearly good, for as soon as Rebecca came of age the action was determined. The defendant may plead in bar of the last continuance, that the infant is of full age. A plea in abatement that the plaintiff is an administrator *durante minore etate*, and not a general administrator must aver that the infant is under age.

14. SPARKS v. CROFTS, M. T. 1696, K.B. Carth. 432; S.C. 1 Ld. Raym. 265.

Action against administrator *durante minoritate*, as general administrator; he pleaded in abatement, that he was but a special administrator during the minority of his wife, but did not aver that she was still under age; for this reason judgment was given against him to answer over. See Carver v. Haslerig, Hob. 251; and Aldred v. Walthall, 2 Roll. Rep. 209.

15. LAWSON v. CROFTS, M. T. 1660. K. B. Sid. 57.

It is an unsettled question, whether if an executor or administrator *durante minore etate*, continues in possession of the goods after the full age of the executor how he shall be charged. Some have holden that he may be sued as executor *de son tort*; but this doctrine has been denied by others, because he comes to the possession of the goods lawfully. Others have holden that he may be sued as administrator *durante minore etate*, because a stranger cannot know the age of the rightful executor; and the only notorious act by which it may be discovered that he is no longer administrator *durante minore etate* by continuing in possession

* But if administration be granted generally to one during the minority of an infant executor, the grantee has authority to make leases of any terms vested in such infant which shall be good till he comes of age; and, as it has been holden by some, until he avoids them by actual entry. See Sir M. Finche's case, 6 Co. 676; Bac. Ab. tit. Leases; and Godb. 104, pl. 122; 2 And, 132, pl. 78; Munn v. Dunkin, Finch Rep. 298.

sion of the goods after the full age of the executor, he becomes an executor *de son tort*. Letters of administration granted to A. during the absence of B., are good. [244]

estate, is the fact of ceasing to intermeddle; and of this opinion was Hobart, J. to which Windham, J. agreed, but several of the judges held that he might be detained upon the special matter disclosed; and this was not denied. See 18 Hobart, 265, 266; *post*, tit. Executor and Administrator.

(B) DURING THE ABSENCE OF EXECUTOR BEYOND SEA.

1. HODGE v. CLARE. M. T. 1689. K. B. 4 Mod. 14; S. C. 1 Lutw. 342.

A scire facias was brought by an administrator during the absence of another. Upon oyer of the scire facias, the defendant demurred; and exception was taken; 1st. That it was not averred that the party was absent at the time of administration committed, and that he continued absent. 2ndly. That the administration was void for uncertainty, for it appeared to be granted during the absence of B., the absence &c. 3dly. That it was void because the ordinary had no power to grant such administration by the common law, the authority under which he acts being given him under a particular statute. But the Court held these objections to be untenable: observing, that they were clearly of opinion that the administration was good, and that payment of the debt to such administrator, after the return of the next kin, and before notice, would be valid; and that though actions brought by such administrator shall abate when the right person returns to England, yet actions brought against him shall not, but shall be continued against the rightful administrator. See observations on this case, 2 Ld. Raym. 1072.

2. SLATER v. MAY. M. T. 1703. K. B. 2 Ld. Raym. 1071; S. C. 1 Salk. 42.

S. P. BEALE v. SIMPSON. H. T. 1696. C. P. Lut. 632. HODGE v. CLARE. M. T. 1689. 4 Mod. 14.

B., being an administrator during the absence of J. S. brought an action of debt on a bond, but did not aver where J. S. was resident, or that he was absent. *Per Cur.* It is but reasonable the ordinary should have power to grant administration during absence as well as minority, or pending a suit, and such administrator is accountable to the executor: and although it may be intended that he is beyond sea, yet the plaintiff ought to aver that he was absent. Judgment for the defendant. See 3 Salk. 23; Lutw. 102, 3 Brownl. 83; Cro. Eliz. 602; Hob. 250; 4 Dy. 351. G.

3. TAYNTON v. HANNAY. H. T. 1802. C. P. 2 B. & P. 26.

The plaintiff having taken out letters of administration according to the form prescribed by the 33 Geo. 3. 187. and having been appointed by order of the Court of Chancery, in a suit instituted against him, to collect the debts of the deceased, brought an action to recover a debt due to the testator; the defendant pleaded, that on a day prior to the commencement of the action, the executor to whom probate of the will had been granted, died. On demurrer the plea was held bad by Rooke and Chambers (Avanley, C. J. dissentient) on the ground that the authority of the special administration continued until the appointment of a new representative, notwithstanding the death of the executor. Chambers, J. observed, that although this act was made for very beneficial purposes, yet many of its provisions had been framed with a short-sighted view of legal consequences.

(C) PENDENTE LITE, OR PENDING LITIGATION.

1. FREDERICK v. HOOK. T. T. 1689. K. B. Carth. 153.

[245] In debt on bond by an administrator, the defendant craved oyer of the let-

* This statute enacts, that if at the expiration of twelve calendar months after the death of the testator, the executor to whom probate has been granted is residing out of the jurisdiction of the king's courts, the Ecclesiastical Court, which has granted the probate, may, upon the application of any creditor, next of kin, or legatee, grounded on affidavit, grant a special administration to such creditor, &c. for the purpose of being made a party to a bill in equity, to be exhibited against him, and to carry the decree into effect, and no further or otherwise. And by sec. 4, the Court of equity in which the suit shall be depending, may appoint any person to collect the debts due to the estate, and give discharges for the same. But by sec. 5, if the executor, capable of acting as such, shall return to and reside within the jurisdiction of any of the king's courts pending such suit, such executor shall be made party to such suit, and the costs incurred by granting such administration, and by proceeding in such suit against such administrator, shall be paid by such person out of such fund as the court shall direct.

ters of administration, from which it appeared that the plaintiff was a special administrator quoad this bond only *pendente lite*, touching the validity of the will of the testator; and then pleaded in abatement that the testator had made her will, and constituted the plaintiff her executor, and that the plaintiff had improperly brought this action as administrator, and not as executor, *petit judicium de billa, &c.* Demurrer to plea. *Per Cur.* Administration *pendente lite* concerning a will is utterly void; and the difference is, where there is a controversy in the spiritual court concerning the right of administration, and where it is concerning the validity of a will. In the first case, administration granted *pendente lite* is good; but it is otherwise where the controversy is concerning a will, for he who comes in under the will shall avoid all that an administrator may have done.* See *Smith v. Smith*, 3 Keb. 54.

2. *WOOLASTON v. WALKER*, H. T. 1730, K. B. Fitzg. 202; S. C. 2 Stra. 917; 2 P. Wms. 567, more fully reported in 2 Selw. N. P. 756, n. 14; recognised by Lord Hardwick in *Willis v. Rich*, 2 Atk. 285.

The plaintiff in the original action declared on a promissory note as administrator *pendente lite*. On a writ of error being brought, it was contended that there being a will, the ordinary had no power to grant administration. On the other side it was argued that it was necessary that the ordinary should have power to grant administration pending the suit as during the minority or absence of an executor, otherwise great inconveniences would ensue, for in that interval any person might take and embezzle the testator's goods, and yet be exempt from any liability. These arguments were endeavoured to be answered by stating that the reason why the ordinary was allowed to grant administration during minority is, that for that time there is in effect an intestacy because the executor is incompetent to perform the will of the deceased; and the reason of a limited administration being granted during absence is, that there the executor has committed a default which the ordinary is bound to supply. After several arguments, it was said *Per Cur.* We can see no difference in the cases of absence or minority but what makes in favour of the present administration. It would be very inconvenient if nobody could call in the effects pending the dispute, which often lasts many years. We cannot say this administration is void, because it is not determined yet whether there is a will or not.† The judgment of C. P. was affirmed. See 2 Barnard, Rep. K. B. 14, 428; 11 Vin. Ab. 106; 3 Bac. Ab. 56; Andrews, 366; Carth, 153; 1 Roll. Ab. 888; Lutw. 342; Owen, 35; 4 Mod. 14; Salk. 42; 2 Brownl. 83.

3. *IMPEY v. PITT*, T. T. 1678, K. B. 2 Show, 69; S. C. T. Jones, 133. A question arose in this case whether an administrator *pendente lite* respecting a will is liable to an action on the contracts of the supposed testator; and it was clearly held by all the judges that he was liable, he is for the time a complete administrator. See 1 Lord Raym. 661.

4. *VAUGHAN v. BOWNE*, H. T. 1748, K. B. 2 Stra. 1106; S. C. Andrews, 328.

The defendant was sued as executor, and pleaded a judgment recovered by himself in the life-time of the deceased, and a retainer. The plaintiff replied that he was executor only *de son tort*, and the defendant rejoined puis darrien continuance, that he had since obtained letters of administration. On demurrer, it was objected that the rejoinder was in effect to abate the plaintiff's writ, which had been properly brought by matter subsequent, not depending on any

* See *Wollaston v. Walker*, 2 Stra. 918; S. C. 2 Selw. N. P. 757; in which it is stated that no judgment was actually given, the parties having compromised.

Administration *pendente lite* cannot be obtained on motion without the prior consent of the parties. *Worthley v. Cock*, 1 Adams, 326.

† Lee, J. coincided in opinion with the Court, but on different grounds, viz. that it did not appear to the Court that there was any will, and therefore he thought the case was stronger in this than in either of the other limited administrations, because in them a will plainly appears, but the execution thereof is suspended through the disability of the executor. See 2 Selw. N. P. 757, n.

‡ In an action by an administrator *pendente lite* it should be averred in the declaration that the suit is still depending; (see *Croft v. Wallbank*, Yelv. 128; 2 Roll. Rep. 209; Cro. Jac. 590; Precedents, 2 Stra. 917;) though in suing an administrator of that description, any averment of the pendency of the suit is unnecessary.

But this distinction no longer exists, and administration may be granted the suit respects a will or the right of administration.

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Such an administrator is suable on the contracts of the deceased;†

An administrator *pendente lite* may be pleaded puis darrien continuance, to justify a retainer.

act of the plaintiff's, and that the rejoinder was a departure from the plea. *Sed per Cur.* The rejoinder is well enough; for the first plea does not say there was a will, and the defendant could not at that time do otherwise than admit that he was acting as executor; and it would be very hard to lay it down, that if a man who sues for administration is opposed, and the cause runs out into any length, that the acting during the suit should be construed such a wrongful executorship as never can be purged, so as to give him the benefit of retaining; besides, these pleas of *puis darrien continuance* begins with a relinquishment of the verification in the former pleadings, which shows it may be departed from. Judgment for the defendant. See *Stiles*, 387.

If the wife of A. is left executrix, and she dies before probate, administration of the husband's effects must be granted to the next of kin to the husband, and not to the next of kin of the wife.

[247] Administration granted *de bonis non cum testamento* to one, where two had equal right to administration, is good. When an executor of the deceased has proved the will but has died intestate, an administration *de bonis non* is necessary; but not if he die before probate, altho' he may have administered to part of the effects.

If administration *de bonis non*, &c. be taken out, and the grantee of the reversion of a term dies seised, the administrator may have a special action of trespass, for the term had an existence as soon as administration was granted.

V. OF ADMINISTRATION IN CASE OF THE DEATH OF THE ADMINISTRATOR, OR EXECUTOR INTESTATE.

1. *HARRIS V. CASE*, T. T. 1675, C. P. 2 Mod. 101.

On a motion for a prohibition, it appeared that A. made a will, and appointed his wife executrix, and bequeathed a shilling to his daughter for a legacy, and died; the executrix, before probate of the will also died intestate. The question was, whether the property should be administered under the 22 & 23 Car. 2, c. 10, amongst the next of kin to the executrix, or to the next of kin to the testator, since she dying before probate, her husband in judgment of law also died intestate. The Court came to no express determination, but seemed to think that this case was within the statute, and that administration must be committed to the next kin of the husband; but if there should be no distribution, it must then be according to the will of the intestate. See *Vern.* 200; *Jones*, 225; 1 *Roll. Ab.* 907; *Cro. Eliz.* 211; *Fitzg.* 205; *Ca. Temp. Talb.* 209; 1 *Salk.* 309; 12 *Mod.* 16; 1 *Com. Dig.* 262; *Show.* 2; 10 *Mod.* 315; 5 *Co.* 9.

2. *TAYLOR, appellant, v. LADY SHORE*, T. T. 1680, K. B. T. Jones, 161.

M. A. widow, made her will, and appointed E. W. her executrix, and bequeathed the residue of her property to the disposal of the executrix and Sir J. S. her brother, and died. E. W. not having proved the will, made her own will, and appointed Elizabeth Taylor executrix. After the death of Lady W. administration of the goods, &c. *cum testamento annexo*, was committed to Sir J. S. who by his will made his wife his executrix and afterwards administration *de bonis non*, &c. was committed to Lady S. wife and executrix, of Sir J. S.; and E. Taylor having prayed administration to be granted, and that application being denied, she appealed to the delegates. And the Court was of opinion, 1st, That the bequest of the residue by the words aforesaid was a bequest of the interest, and not an authority only. 2dly, That though administration might be granted to the appellant and appellee together, yet there was no cause of appeal; and the grant of the judge *a quo* of the administration was confirmed, and the appellant condemned in 10*l.* costs.

3. *WANKFORD V. WANKFORD*, M. T. 1698, K. B. 1 *Salk.* 305, 308.

Per Holt, C. J. When a will is made, and H. appointed executor thereof, if the executor administers, but dies before probate, an immediate administration should be committed; whereas, if the will has been proved, the administration must be *de bonis administrat*, by the executor.

4. *TREVILLIAN V. ANDREW*, H. T. 1696, K. B. 5 *Mod.* 384.

In ejectment the jury found the following verdict; that a lease had been made for ninety-nine years, if three persons should so long live, and that one of the said persons was living; and that another lease had been made to the lessee for ninety-nine years, if he should so long live, and that he assigned his term to the other, who died intestate; and that this person was living; and that one Spry, who had a grant of the reversion, entered before administration *de bonis non* was granted, and died seised. The question was, whether that had taken away the entry of the administrator. *Per Cur.* The term had an existence as soon as administration was granted, and the administrator may have a special action of trespass.

may have a special action of trespass, for the term had an existence as soon as administration was granted.

5. RICHARDSON v. SEISE, M. T. 1698, K. B. 12 Mod. 306.

Holt, C. J. If a *feme covert* be executrix and legatee, administration *de bonis non* ought to be to the husband; if she be not legatee, and others are, it ought to be given to them, if there be no legacies to the next of kin to the first testator. See Com. Dig. Administrators, B. 6; 1 Vent. 219; 2 Lev. 56; 3 Bac. Ab. 19; 11 Vin. Ab. 87, 89; 2 Roll. 158.

6. CLERK v. WITHERS, M. T. 1701, K. B. 1 Salk. 322; S. C. 2 L. Raym. 1072.

Per Cur. Since the 17th Car. 2. c. 13.* an administrator *de bonis non* may commence an execution on a judgment obtained by an executor or administrator; it is but reasonable, and within the equity of that act, that an administrator *de bonis non* should be permitted to perfect an execution thus begun, for the right now comes to him. See 5 Mod. 384.

7. YOUNG v. JOLLAND, M. T. 1658, K. B. 2 Sid. 122.

The husband died, and left his widow within the age of 17 years; and administration *durante minore etate* was granted to her; against whom Y. brought an action of debt, and had judgment. The father died, and the widow being now of full age, and married again, administration *de bonis non*, &c. was granted to husband and wife, against whom Young, who had the judgment, brought a *scire facias*, &c. and adjudged well brought, because it is for a debt from the first testator; and a diversity was taken between *scire facias* against an administrator of an administrator, and a *scire facias* by an administrator of an administrator; for if administrator has judgment and dies, the second administrator cannot have *scire facias* because he claims paramount the first administrator, who had the judgment, being in by the testator; but *scire facias* may be sued against the second administrator on a judgment had against the first administrator, because both claim as administrator to the intestate, and by consequence both are liable, and so no inconvenience but this *scire facias* ought to be for the judgment only, and not for damages and costs.

8. TINGREY v. BROWN, T. T. 1798, C. P. 1 B. & P. 310.

This was an action on the 4 Geo. 2. c. 28. by the administratrix of an executor, against the intestate's tenant, for continuing to occupy lands after the termination of the defendant's lease, and after notice, contrary to the above statute. On demurrer it was urged for the plaintiff, that it was unnecessary for her to obtain administration *de bonis non*, since it was clearly a debt due to the testator. But *Per Cur.* In order to entitle the plaintiff to maintain this action, it was incumbent on her to sue out administration *de bonis non*; it being a settled principle that until the debt is actually paid to the executor, it is considered as property unadministered.—Judgment for defendant.

VI. HOW ADMINISTRATION IS TO BE GRANTED.†

1. HAMMOND v. MOORE, H. T. 1662, Sid. 100, S. P. FAWTRY v. FAWTRY, M. T. 1690, K. B. 1 Salk. 36.

Obligee of a bond debt of £500 died intestate; the ordinary committed administration of £100 thereof to A. and of another to B. &c. It was held clearly by the Court to be void; for several administrations cannot be committed of a thing entire; nor can administration be granted of goods in one county to A. and in another to B. See 1 Com. Dig. Administrator, B. 7; Rol. Abr. 908.

2. TAYLOR v. GORE, H. T. 1616, K. B. 1 Keb. 434.

It was suggested by Windham, J. that the administration cannot be com-

* Made perpetual by stat. 1 Jac. 2. c. 17; which enacts, that where any judgment after a verdict shall be had, by or in the name of any executor or administrator, in such case an administrator *de bonis non* may sue out a *scire facias*, and take execution upon such judgment.

† It is usually granted by writing under seal; it may also be committed by entry in the registry without letters *sub sigillo*; but it cannot be granted by parol. See Bro. Adm. pl. 27; cites 21 H. 6, 43; Godolph. 261; Com. Dig. Administrator, B. 7; 11 Vin. Ab. 70.

‡ There may be, however, a limited or special administration committed to a party of certain specific effects, as of a term for years and the like; and the rest may be committed to others or of effects of the intestate in this country or place to one, and for effects in that country or place to another. Com. Dig. Administration, B. 7; Rol. Abr. 908. Thus the ordinary may grant administrations *quoad* part to the wife, and as to the other part to the next of kin, 3 Bac. Ab. 55, 11 Vin. Ab. 71; 1 Salk. 36.

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If the executrix herself be the residuary legatee, immediate administration shall be granted to her administrator. An execution commenced by an administrator, may be perfected by an administration *de bonis non*.

Or a *scire facias*.

Administration *de bonis non* must be obtained to enable the administrators of an executor to sue a tenant for holding over even in his own time.

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Administration cannot be granted to several of an entire thing; or of goods in one county to A. and in another to B. Or of several distinct parcels.‡

mitted of part of any debt, but may be severally of the goods in several counties. *Sed Curia contra.* The ordinary may commit administration to as many as they will, but not by several parcels. See 3 Bac. Abr. 57; Rel, Abr. 906; 1 Salk. 36.

3. *THE KING v. BETTESWORTH*, M. T. 1733, K. B. 2 Stra. 956.

A commis-
sion or ap-
praisement
may be a-
warded by
the spirita-
l court be-
fore grant-
ing admin-
istration with
the will an-
nexed.

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I. K. made his will, and appointed two persons executors, and left the residue of his personal estate to his youngest son E. The executors renounced, and the residuary legatee moved for a *mandamus* to be admitted to prove the will, and have administration with the will annexed. On a rule to show cause, it was insisted that this case differed from Lord Londonderry's, (2 Stra. 857.) where the commission of appraisement was set up against the immediate grant of a probate; which the stat. 21 Hen. 8. c. 5. requires shall be without any frustratory delay. And the ordinary has no election in that case; whereas in the present, he is not bound to grant administration to the residuary legatee, none of the statutes mentioning him; on the contrary, stat. 21 Hen. 8. c. 5. which takes notice of the renunciation of executors, leaves the matter to the election of the ordinary. The Court concurred in this opinion; observing, that if the commission of appraisement was a grievance, it would be a proper matter of appeal; but they could not break into the practices of the court below; and discharged the rule for a *mandamus*. See *Barnard*, K. B. 334; 2 Keb. 139; pl. 118; 3 Bac. Abr. 535; Toller, 247.

4. *FOLKS v. DOMINIQUE*, T. T. 1749, K. B. 2 Stra. 1137.

The spirita-
l court
may take a
bond for a
due admin-
istration
where it is
granted
*cum testa-
mento an-
nexo.*

The plaintiff declared on a bond in the *definet* against the defendant as administrator during minority, with the will annexed; and on oyer, the condition appeared to be for exhibiting an inventory, and duly administering the effects of an intestate, by paying debts and legacies. The defendant pleaded performance of the condition; to which the plaintiff replied, that he had not paid a legacy of £1500 though he had more than sufficient to pay all the debts, to wit, £500. On demurrer, it was objected that the bond was void, and not warranted by stat. 21 Hen. 8. c. 5. or valid at common law by requiring an administrator to pay legacies or distribute according to the rule of the Ecclesiastical Court, and must be taken to have been obtained by coercion. *Per Cur.* These administrations are not within stat. 21 Hen. 8. We must therefore refuse the *mandamus*. The bond must be considered as an instrument at common law; and then it is sufficient, if it be good in that part on which the breach is assigned; and as we think this is so, we cannot assume that it was a bond entered into by compulsion. Judgment for the plaintiff. See *Raym.* 227; 1 Vent. 166; *Cro. Ent.* 128; *Hob.* 250; 2 Lev. 163; 2 Show 396; 2 Jones, 90; 1 Saund. 162; 3 Co. 83.

VII. WHEN ADMINISTRATION IS VOID OR VOIDABLE.

(A) WHEN VOID.

1. *ABRAHAM v. CUNNINGHAM*, H. T. 1675, K. B. T. Jones, 72, S. C. 2 Mod. 146; S. C. 2 Lev. 182; S. C. 1 Vent. 303; S. C. 3 Keble, 725; S. C. Danv. 350; S. C. 1 Freem. 445.

Administra-
tion is void
if there be
an executor
named al-
though the
will were
suppressed,
or its exis-
tence un-
known at
the time of
granting it;

In ejectment a special verdict was found, which stated that David Cunningham being possessed of an *interesse termini* for 30 years, to commence in 1671, made his will, and made another David Cunningham his executor, and died in 1659. David, the executor on the 8th Oct. 1661, made his will, and appointed Ninian Cunningham, and Andrew Hay, his executors; and on the 15th Sept. 1665, died, having proved the will of the first David. The ordinary, not having notice of the last will of 14th Feb. 1665, granted administration *de bonis non* of the first David, *non administratis* by the second David, to Bradbone, a creditor of the first David; no probate being made of the will of the second David, on the 21st Oct. 1671, Hays, the surviving executor, renounced the will of the second David before the ordinary, whereby the first David died intestate, on the 1st March, 1672. Bradborne for 1000*l.* assigned the term to Lovelace on the 11th Feb. 1673. Bradborne was sued by citation to repeal the administration committed to him; and on the 13th Feb. 1673, the administration was repealed and committed to Cunningham, the

defendant who entered upon the premises; when Lovelace re-entered, and made the lease to the plaintiff, whereupon the present action was brought; and whether the plaintiff or defendant had the better title, was the question. The Court were strongly of opinion for the defendant, that the administration was void at first, and was not made good by the renunciation of the executor; and consequently the sale by the administrator, though made after the renunciation, was void; and gave a rule for judgment for the defendant *nisi causa* before the end of the term. Judgment for the defendant. See Com. Dig. Administrator, B. 1; 1 Plowd. 279. 282; 7 Ed. 4 pl. 12. 13; Dyer. 372; 31 Ed. 3, c. 11. Godolph. 59. 10 Mod. 21; 2 Bac. Ab. 405; 2 Anderson. 150; Ld. Raym. 453; Mod. 214; Com. 150; Fitz. 258; 2 Vern. 75; Stra. 911; Ld. Raym. 520; 2 Rol. Abr. 399; 2 Co. 28 b; 3 P. Wms. 351; 8 Co. 18; 1 Salk. 36; Show. 407; 1 Leon. 90; Moor. 636; 1 Vern. 31; 1 P. Wms. 752; Stra. 412. [251]

2. KEGG AND ANOTHER V. HORTON, M. T. 1685, C. P. 1 Lutw. 399.

In debt on bond condition to save the plaintiffs harmless, as bail for one L. at the suit of W. the defendant pleaded non damnificat; and the plaintiff replied that W. in M. T. 1680, sued L. in the Exchequer, and that the plaintiffs in H. T. following became bail for L. and averred, that the action and bail mentioned in the condition and in the replication were the same *quodque post veredictum et ante judicium præd' versus præd' ad sectam præd' W. sicut præfertur obent' scil' such a day W. died intestate, and administration was granted to G. by the Bishop of London; that the defendant had not paid the condemnation, and the plaintiffs had paid 23l. 10s to the administrator. Upon demurrer to this replication, it was contended, that the judgment being at Westminster, the letters of administration granted by the Bishop of London were void. And the Court, adopting this opinion, gave judgment for the defendant. See Hard. 316; 1 Salk. 39; 1 Plowd 44. 767; Com. Dig. Administration, B. 3; 3 Bac. Ab. 36; vide ante, 231. Or by an incompetent authority.**

(B) WHEN VOIDABLE.

1. BLACKBOROUGH V. DAVIS, E. T. 1700, K. B. 1 Salk. 38; S. C. 1 Ld. Raym. 685; Com. 94; 1 P. Wms. 41; 12 Mod. 615.

Administration being granted to the grandmother, the aunt moved for a mandamus to have it granted to her, urging that the first administration was void, she being nearer in degree; and that there needed no repeal, this administration being granted to a wrong person, in which case the very grant of a new administration amounts to a repeal. Per Holt, C. J. *contra*. It is not void, but only voidable; for according to that argument trover would lie against the first administrator, and all the intermediate acts would be a nullity. If administration be committed to a creditor, and afterwards repealed at the suit of the next kin, he shall retain against the rightful administrator, and his disposal of the goods, even pending the citation, till sentence of repeal is pronounced, is valid. Where administration is granted to a party not next of kin, it is not void, but voidable. [252]

2. ANONYMOUS, E. T. 1668, K. B. Sid. 409.

Per Cur. Administration granted to the mother of the goods of the daughter, when the daughter has a husband, shall be repealed, and granted to the baron. Or to the wife's next of kin, instead of the husband; Or the administrator becomes incapable of fulfilling the duties of his office; Or if it be granted non vocatis jure vocandis, without citing the

3. OFELEY V. BEST, T. T. 1667, K. B. Sid 373.

If a rightful administrator becomes *non compos*, the administration is voidable, and new letters shall be granted to the next of kin. Or the administrator becomes incapable of fulfilling the duties of his office; Or if it be granted non vocatis jure vocandis, without citing the

4. HARRISON V. WELDON, T. T. 1731, K. B. 2 Stra. 911.

W. died intestate, leaving Ann his wife, and Amphilis his sister; the sister, on the common oath that she believed died intestate, without wife or children, obtained administration; and in suit to repeal it, as obtained by surprise, it appeared that

* Or the executor absent from this country; (11 Vin. Ab. 68; but vide ante, 242.) or doubtful who was executor, (Com. Dig. Administrator, B. 1; Moore, 636;) or if there be two executors, one of whom proves the will, and the other refuses, and he who proved the will dies, and administration is granted before the refusal of the survivor, subsequently to the death of his co-executor, or if granted before the refusal of the executor, although he afterwards refuse. Com. Dig. Administrator, B. 2; 2 Lev. 182; 1 Show. 411.

necessary
parties.

peared to be the practice of the Court never to grant it to the next of kin until the wife was cited. On the behalf of the sister a prohibition was moved for to restrain the appeal on the ground that the ordinary had executed his authority. 1 Sid. 179. 370; 1 Lev. 186. *Sed per Cur.* The ordinary cannot be said to have executed his authority, having never had the opportunity to make an election which stat. 21 H. 8. c. 5. gives him; that it was incident to every Court to rectify mistakes they were led into by the misrepresentation of the parties; that if there was no surprise (of which the Court below were judges) there ought to be a prohibition, because then the administration will have been duly and regularly granted; but here was a plain surprise, and the prohibition ought to be refused. See 1 Salk. 36; Keb. 123; 1 Lev. 205; 3 Co. 786. Com. Dig. Administration, B. 8; 11 Vin. Ab. 115; 1 Lev. 305; Burn Eccl. L. 249.

5. THOMPSON v. BUTLER, T. T. 1671, K. B. 2 Lev. 55.

If there be a residuary legatee, and administration be granted to the next of kin, though not void, it may be repealed, whether there be any present residue or not.

A man made his will, and thereby gave 2000*l.* to his daughter, and the residue of his estate, after the payment of his debts and legacies, to his wife, and made J. S. his executor, and dies. J. S. dies intestate, and for six years after no one obtained administration. At last the daughter sued out administration *de bonis non*, &c. and continued administratrix four years, and during that time she obtained divers judgments and decrees in that character. And now the wife being residuary legatee, cited the daughter into the Ecclesiastical Court, to have this administration repealed, and granted to her, which the Ecclesiastical Court being ready to do, the daughter prayed a prohibition, surmising there was no residue. Hale, C. J. said, the reason why administration granted to the next of kin was not revokable under the statute of H. 8. is, because it is intended that such administrator shall have the whole residue to his own use; and upon this account the ordinary could not grant distribution, nor oblige the administrator to distribute, till the law was altered by the late statute. But that has not altered the case; yet where there is a residuary legatee that legatee being entitled to the whole surplusage by the appointment of the testator, and the administrator to nothing, he held that administration, though granted to the next of kin, might be revoked, and granted to the residuary legatee. And the circumstance of there being no present residue did not alter the question.

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VIII OF REPEALING ADMINISTRATION.

1. PRICE v. PARKER, H. T. 1663, K. B. 1 Lev. 157. S. P. OFFEY v. BEST, T. T. 1665, K. B. 1 Lev. 186.

If administration be granted as prescribed by statute, it cannot be revoked unless there be just cause; and whether the cause be just or not is a question for the temporal courts. Where the ordinary has elected to grant administration to the father, he has no power of re-

To debt for rent by an administrator the defendant pleaded, that the administration granted to the plaintiff was *debilo modo* revoked, and granted to A. B. Replication, that the plaintiff was the next of kin to the intestate, and that he had sued an appeal from the said sentence, to which the defendant demurred. And the question was, whether the ordinary, having granted the administration to the next of kin according to the statute, could revoke it? *Per Cur.* The ordinary cannot revoke an administration granted according to the statute without just cause; and whether the cause be just or not is to be determined by the Court here. But after a party has been made administrator, this Court ought to intend that it was done upon sufficient grounds; and he who wishes to revoke an administration ought, by pleading, to show the cause, so that it may appear to the Court to have been granted improperly. We are therefore of opinion that it may be revoked for just cause, as if it was granted originally contrary to the statute, or if the administrator afterwards becomes disabled by lunacy or the like. See 11 Vin. Ab. 114; Com. Dig. B. 8; 4 Barn. Ecc. L. 248; 249; Skin. 156; 2 Roll. Abr. 303; Sly. 10. 74. c; 31 Edw. 3. c. 11; Amb. 303; 3 Cro. 163; 27 H. 8. 26; Owen, 50; 1 Sid. 280; 1 Keb. 146; Yelv. 83; Brownl. 51, 91; 2 Lev. 55; Cro. Eliz. 459; 1 Saund. 143; 1 Mod. 62; 2 Atk. 285; 2 Str. 917.

2. SIR GEO. SANDS' CASE, E. T. 1661, 3 Salk. 22; S. C. T. Raym. 93; Sid. 179; 1 Keb. 667.

Sir G. Sands administered to his son, and afterwards a woman, pretending

to be his wife, sued for a repeal; but a prohibition was granted, because the ordinary had an election to grant it either to the father or wife, and had executed his power by granting it to the father. *Per Holt, C. J.* Where a *feme covert* dies intestate, and the next of kin to her obtains administration, and the husband sues for a repeal, a prohibition would be denied,* because in this case the ordinary has no power or election to grant it to any person, but to the husband; and this is not within the statute of H. 8. but governed by the statute of Edw. 3. See 11 *Vin Ab.* 1111; 12 *Mod.* 813.

3. *OFFLEY v. BEST.* T. T. 1665. K. B. 1 Lev. 186; S. C. 1 Sid. 293. 370. A man died, leaving a brother, and a sister married to B. who procured administration to be granted to his wife, the sister, pending a caveat entered by the brother. Upon appeal by the latter, it was adjudged *Per Cur.* That where administration has been granted according to the statute, the ordinary pending a caveat cannot revoke it without cause, because the grantee has an interest in the property by the statute, which the ordinary cannot take from him. See *Belsworth v. Belsworth*, Sty. 10; *Cro. Eliz.* 315.

4. *AYLIFFE v. AYLIFFE.* M. T. 1670. K. B. 2 Keb. 812; S. C. Fitzg. 703. A prohibition was moved for on behalf of a younger brother, who had obtained administration, to restrain the Ecclesiastical Court from proceeding in a suit, instituted by an elder brother, to repeal the letters of administration, the ordinary having executed his power. *Per Hale, C. J.* Had the letters been obtained pending a caveat, they might have been repealed by the Ecclesiastical Court on the ground of surprise, but not barely by one in *equi gradu*; and the Court ordered cause to be shown against the prohibition, though there was only a citation, which in cases of repeal contains all the necessary facts, but no stay *interim*.

5. *DUBOIS v. TRANT.* M. T. 1699. K. B. 12 Mod. 438. *Per Holt, C. J.* If administration be once granted to a creditor, and afterwards a larger creditor applies to obtain it, the prior administration shall not be revoked for him, and the rule *factum valet fieri non debuit* is in such case applicable.

6. *DUBIOUS v. TRANT.* M. T. 1669. K. B. 12 Mod. 436. A. an infant, was made executor and residuary legatee; and, if he died under age, then B. another infant, was appointed residuary legatee; and on the like contingency, the residue was bequeathed to C. Administration during the minority of A. was granted to M. his mother. A died intestate, under age; B. was still an infant; and, on the question whether the administration might be repealed, and granted to C. the Court seemed to be of opinion that the ordinary had executed his authority, and that M. should not be divested of the administration during the infancy of B.

And *Holt, C. J.* said it was a point worthy of consideration; and much might be said to prove that the ordinary had executed his authority, and that a prohibition ought to issue directing the party to declare immediately.

7. *BROWN v. POYNES.* M. T. 1671. K. B. Sty. 147. The testator made two executors, who both died in his life-time; then he died, leaving two sisters, and the eldest obtained administration. The youngest moved the Court of B. R. for a prohibition to repeal it, because she, being in equal degree, ought to have an equal share of the administration; but the Court said that a prohibition lies not; because if the administration was not rightly granted she might bring an appeal.

8. *HARRISON AND WIFE v. MITCHELL.* T. T. 1731. K. B. Fitzgib. 309. A. died intestate, and his sister having obtained administration, a citation issued at the suit of the intestate's widow against the administratrix, to show cause why the administration should not be repealed; to restrain these proceedings, a prohibition was now moved for. It was admitted by the plaintiffs' counsel, that the ordinary had an election to grant the administration either to the wife, or to the next of kin; but that election being once determined, the ordinary may repeal it, and grant it to another.

* Qu. Granted.

Or where it has been obtained by fraud or subterfuge it may be repealed by the ordinary.

ordinary had executed his power, and could not repeal the administration. In support of this position, Sir G. Sand's case, 1 Sid. 179. was cited. For the defendant, affidavits were produced to prove that the course of the spiritual court was to suspend the granting of administration for fourteen days after the intestate's death; and that during that time the plaintiff had amused the widow, by assuring her that nothing would be done in prejudice of her right, which prevented any opposition being offered to the administration granted to the sister; that the sister, before the letters of administration, had been granted to her, had made oath in the spiritual court, not only that he was the next of kin; but also that the intestate was never married: and therefore it was argued, that the administration was obtained by surprise and fraud, and that the ordinary had not had the opportunity to elect as given by the stat. 21 Hen. 8. *Per Page and Probyn, Js.* The administration having been obtained by surprise, and by a false suggestion to the Court, the suit for a repeal is reasonable. And this differs perhaps from Sir G. Sand's case, for it does not appear what the circumstances of that case were. But *Lee, J.* said that it was the common practice of the spiritual court to require an affidavit that the party is the person entitled, before they grant administration to him, and therefore the same surprise must be supposed to have been in Sand's case as here, though as to the facts the book is silent; and the reason there given is, that the power being once executed, the ordinary cannot go back; if such suits are allowed, it cannot be said within what time after the administration granted they may proceed to repeal it. The prohibition was refused.

9. *RAVENSCHROFT v. RAVENSCHROFT*. T. T. 1669. K. B. 1 Lev. 305; S. C. 2 Keb. 726.

The intestate died, leaving T. his eldest son, and R. his second son, and divers other children. T. the eldest, is made administrator; and R. the second son, applies to have it repealed and granted to him, alleging in the Delegates that it was agreed between the sons and daughters that R. should be administrator in trust for all the younger children, and that T. had 1000*l.* per annum, and all the younger children had nothing; whereupon T. prayed for a prohibition, for the letters of administration having been granted according to the statute, could not be repealed; but it was contended, that when administration is granted, when not grantable, it might be repealed; and the Court discharged the rule, and observed, that if the Ecclesiastical Court proceed *inverso ordinis*, or irregularly, the administration might be repealed by the Delegates. See 2 T. R. 597. 1 *Ld. Raym.* 63; 1 *Salk.* 313; *Yelv.* 83; 1 *Roll. Ab.* 910; 2 *Lev.* 55; 1 *Sid.* 280; 1 *Mod.* 62; 2 *Saund.* 148; 6 *Co.* 18; *Cro. Eliz.* 459.

Or where granted, *inverso ordine*.

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But the ordinary can not revoke the grant on the ground of subsequent abuse; Or for an omission to bring in an inventory. Where administration is repealed for a defect in form, the ordinary must regrant it to the same party, altho' there

10. *THOMAS v. BUTLER*. T. T. 1671. K. B. Vent. 219.

In arguing this case it was suggested at the bar, that it was the usual course for the Ecclesiastical Court to repeal an administration, though granted to the next of kin, in the case of abuse. But *Hale, C. J.* said that in doing so they exceeded their power, and a prohibition ought to go; and that the ordinary should take sufficient caution in the first instance to prevent mal-administration.

See *Com. Dig. Administration, B. 8.*

11. *HILL v. BIRD*. E. T. 1671. K. B. Sty. 102.

An administration cannot be revoked for not bringing in an inventory and account of the administration.

12. *OFFLEY v. BEST*. T. T. 1665. K. B. Sid. 208.

The Court in this case adopted a suggestion, that where letters of administration are repealed for defects in matter of form, the Ecclesiastical Court ought to regrant them to the same party, although the respective applicants are in *equali gradu*.

IX. EFFECT OF A REPEAL ON MESNE ACTS.*

1. *ANON.* M. T. 1705 C. P. 1 Com. 151.

Per Treaver, C. J. There is a difference between the administration which

* The general rule connected with this subject may be thus briefly stated: that if the

is repealed upon a citation and that which is repealed upon an appeal. The former suspends the administration, consequently all the acts after suspension are void. But if it be repealed by citation, all the acts of the administrator anterior to the repeal are good; for by the citation the grant of the administration is not suspended; therefore, if it be repealed, all acts done by an administrator, which a rightful administrator might have done, shall be allowed, for in respect to them he acted in the place of the rightful administrator. But it is otherwise in the case of an executor, for the probate of the will gives no authority at all to him, and therefore if he is not the rightful executor, he has no authority at all, and it would be unreasonable that a person who has no authority should dispose of the interest of another. The rightful executor has not only a trust, or authority to administer the goods of the testator, but also an interest annexed to the trust, and therefore the property in all the goods, after administration, is completely vested in him; and consequently the disposition of the goods of the testator, or release of his debts, is a disposition of the interest of the rightful executor, and therefore such disposition does not bind him, and so it was resolved, Roll. Ab. 719. 919. See *Peckman's case*, 6 Col. 180; *Moore*, 396; 3 T. R. 138; 3 Lev. 90; 1 Stra. 509; 4 Bac. Ab. 11; *Ld Raym.* 244; *Com. Dig.* 264; 2 Keb. 206.

2. *SEMINE v. SEMINE*. M. T. 1672. K. B. 2 Lev. 90.; S. C. T. *Raym.* 224.

Administration was granted, and the administrator, by virtue thereof, being possessed of a term, made a lease of land; subsequently there was a motion to repeal the administration, but it was affirmed; upon which sentence of affirmation an appeal was sued out, and the sentence of affirmation was repealed, and administration granted to another. *Per Cur.* The new administrator cannot avoid the lease of the first administrator, for this is only a repeal of the sentence in the citation, and is in the nature of a suit on the citation; and hence it is the same as if the first administration had been avoided in the suit upon the citation, and not as if the appeal had originally been brought upon the first administration, which thereby had been totally annulled. See 1 *Roll. Ab.* 919; 1 *Brownl.* 512; 1 *Sid.* 280; *Style*. 10; 6 *Co.* 18; *Yelv.* 83; *Cro. Eliz.* 459; 1 *Lev.* 157. 186. 305; 1 *Mod.* 62. 214; 2 *Saund.* 148; 2 *Ark.* 185; 12 *Mod.* 618; 3 *Salk.* 22; 1 T. R. 125.

3. *BLACKBOROUGH v. DAVIS*. E. T. 1700. K. B. 1 *Salk.* 38; S. C. 1 *Ld. Raym.* 684; 1 *Com.* 96. 1 P. Wms. 41; 12 *Mod.* 615.

Where administration is committed to a creditor, and afterwards repealed at the suit of the next of kin, he shall retain yet the rightful administrator, and his disposal of the goods, even pending the citation, till sentence of repeal pronounced stands good. *Per Holt, C. J.* See *Thomas v. Butler*, *Vent.* 229.

4. *TURNER v. DAVIS*. T. T. 1669. K. B. 2 *Saund.* 148; S. C. 1 *Mod.* 62; 2 *Keb.* 668; *Co. Ent.* 91. a.

Audita querela, by Turner against Davis. The plaintiff declared that one Edward Spicer died intestate, and, after his death, administration of his goods was committed to the defendant, as principal creditor; and the defendant, as administrator, &c. afterwards recovered in this court, against the now plaintiff, 51*l.* for damages and costs in an action of trover for the conversion of the goods of the intestate; and afterwards the administration of the now defendant, upon an appeal to the delegates, was repealed, and administration of the goods of the intestate was granted to John Spicer, the brother of the intestate; by reason whereof the now defendant ought not to have execution on the judgment against the now plaintiff, because he is become chargeable to the said John Spicer as administrator, &c. The defendant appeared, and pleaded in bar that he had recovered the judgment before he was cited upon the appeal to repeal his letters of administration, as the plaintiff has alleged; upon which plea the plaintiff demurred. For the defendant it was argued that

grant of administration be absolutely null and void, the acts of the administrator acting under it are of no validity; but if the grant be only voidable, and the suit for its repeal by citation, all lawful acts by the first administrator are valid; but even in that case, if the revocation is obtained on appeal, reversing a former sentence, the intermediate act of the administrator will be ineffectual. 11 *Vin. Ab.* 114.

be others in equal degree. [257] Distinction between a repeal so administration on citation and on appeal.

If an administrator assign a term, and, upon a citation to repeal the administration, it is confirmed; but upon an appeal from the sentence of affirmation it is repealed, the assignment is good.

Or if administrator to a creditor be repealed by the next of kin, the

creditor may retain. [257] But if the administrator, before the repeal, obtain a judgment for a debt due to the intestate, he is not entitled to take out execution and the defendant may avoid it by citation, if the judgment be reversed on appeal, reversing a former sentence, the intermediate act of the administrator will be ineffectual. *audita querela.*

there was a right vested in the defendant, which could not be divested by the repeal of the letters of administration; for if the money on the judgment had been paid, or levied by an execution, the defendant could retain it, notwithstanding the letters of administration were afterwards revoked, and the now plaintiff would be discharged against the now administrator. And although here the defendant has not received the money, yet by the judgment itself the property of the goods converted is altered, and the now plaintiff shall never be charged again for the conversion of them. And if it should be otherwise, and the now administrator should have an action *de novo* for the same conversion, perhaps it might be barred by the statute of limitations, and so that part of the intestate's estate would be altogether lost. *Sed non allocatur*. For the law abhors circuity of action, and here there will be a circuity of action, if the now defendant should sue out execution, and receive the money; for it is clear that the now administrator would recover it again against the now defendant; and therefore, to avoid circuity of action, the now plaintiff shall be discharged against the now defendant, from the said judgment, and be chargeable to the now administrator for the value of the goods converted. Adjudged for the plaintiff. See 1 *Lutw.* 343; 11 *Vin. Ab.* 102. 117; *Com. Dig. Administration, B.* 10; *Cro. Car.* 138; 8 *Co.* 144; *Cro. Eliz.* 460; *Co. Ent.* 89; *Carler,* 138; 6 *Mod.* 92; *Yelv.* 83; 10 *Mod.* 21; *Fitzg.* 202; 1 *Vern.* 25; 2 *P. Wms.* 576; *Com.* 18; 3 *P. Wms.* 81; 2 *Lord Raym.* 1216; 1 *T. R.* 480; 3 *T. R.* 125.

5. ANONYMOUS. T. T. 1678. N. P. Vent. 349. S. P. BARNHEURST v. YELVERTON. T. T. 1686. K. B. Yelv. 83.

Or if judgment and execution be obtained against the debtor, it will be no bar in an action afterwards against the debtor by the lawful administrator.*

In an action of trover against an executor *de son tort*, a question was propounded, whether the goods having been taken in execution upon a judgment obtained against the defendant by a creditor of the deceased, should discharge him against the plaintiff, who brought this action as administrator; and the Court was of opinion that this execution was a good discharge against another creditor that should sue him, to whom he might plead, *riens inter ses mains*; but it was no discharge against an administrator, for mankind must not be encouraged to meddle with a personal estate without a right; but to prevent this mischief where the party dies intestate, and there is no contest about the administration, a man may procure of the ordinary letters *ad colligendum*.

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A general mandamus may be obtained to enforce the grant of administration, but not one directing it to be granted to a particular person;

Or to enforce a grant of administration *durante minore etate*; Or if there be a suit depending in the Ecclesiastical Court concerning

X. RIGHT TO OBTAIN, HOW ENFORCED.

1. ANON. T. T. 1722. K. B. 1 Stra. 522.

A motion was made for a *mandamus* to the official of the Bishop of Gloucester, to commit administration to the widow of the intestate. *Sed per Cur.* That will be to deprive the ordinary of his election of granting it to her or to the next of kin; therefore take a *mandamus* generally to grant administration of the goods of the intestate. See 1 *Sid.* 281.

2. SMITH'S CASE. H. T. 1720. K. B. 2 Stra. 892.

On a motion for a *mandamus* to Dr. B. commanding him to grant administration to Smith of the goods of his deceased son, during the minority of his grandson. *Per Cur.* When we grant a *mandamus* it is to compel the judge to do right to the party who sues out the writ; but as there is no law which says to whom administration during minority shall be granted, there is no law to be put in execution. In the case of the next of kin, he is entitled *de jure* and therefore in that case we grant a *mandamus* of course. But we will grant no *mandamus* here. See *Banard, K. B.* 370. 425; *Fitzgib.* 173; *And* 24; 1 *Bac. Abr.* 535; *Rex v. Billesworth,* 2 *Stra.* 891. 1118.

3. *REX v. DR. HAY*, on the application of Lovegrove, H. T. 1769. K. B. 4. Burr. 2295; S. C. 1 Blac. 668.

On showing cause against a *mandamus* to be directed to the judge of the same manner, and the execution set aside. *Kett's case, Yelv.* 125. cited in 1 *Lutw.* 443. But on affidavit to stay execution on a judgment recovered by an administrator on the ground that the letters of administration were repealed before the judgment entered, it

Prerogative Court of Canterbury, commanding him to grant a probate of the will of Joseph Brolison, Esq. deceased, to Lovegrove, it was objected that a suit was then pending in the spiritual court concerning the validity of the will. *Per Cur.* Whilst a suit is pending in the spiritual court concerning the validity of a will, that court has complete jurisdiction over the matter. *Rule discharged.*

4. *THE KING v. DR. HAY.* M. T. 1760. K. B. 1 Blac. 640; S. C. 4 Burr. 2295. [260]

On a motion for a *mandamus* to the judge of the Prerogative Court to grant administration of the effects of the late General S. to C. Connor, Esq. his nephew, and next of kin; on a suggestion supported by affidavits of the general's death, that there were then living no children, wife, or relation, in the same or any nearer degree; that he had applied for letters of administration, but was refused on pretence of two caveats; one entered by H. and another by S.; that S. was only first cousin to the general, and therefore one degree more remote than Connor; but that H.'s claim (who was brother to the general's first wife) arose upon this extraordinary accident, that in October 1766, General Stanwix, his second wife, and his daughter by the former wife, set sail in the same vessel from Dublin to England; that the vessel was lost at sea, and no account of the manner of her perishing had ever yet arrived. Whereupon H. as maternal uncle, and next of kin to Miss Stanwix, claimed the effects, under a notion of the civil law, that where a parent and child perish together, and the manner of their death is unknown, the child shall be supposed to survive the parent.* But it was insisted, that assuming this to be the rule universally, and that the principle of the civil law ought to govern in this case (both which were much to be doubted), yet still that could be only a question upon the statute of distributions; whereas the present motion was founded upon the statute of administrations; and as Connor was now the indisputable next of kin to the General, he was entitled to letters of administration, being already in possession of the real estate. *Per Cur.* The computation of degrees in these cases must be according to the civil law. There is *his pendens* in the spiritual court, which has competent jurisdiction over the question, wherein the interest of Mr. Connor is denied, and now in a course of trial. This circumstance it has been allowed, if true, would be sufficient cause; but we refused to hear affidavits concerning it, but required a transcript of the proceedings; in which nothing more appeared, but a general denial of the plaintiff's interest, as is usual in every stage of these proceedings, and not of his consanguinity, as is stated in his own affidavit.

The rule must therefore be made absolute for the *mandamus*, upon the ground of its being for the administration only, (and not the distribution,) to which Mr. Connor is clearly entitled under the statute. *See Carth. 457; 1 Salk. 299; 1 Lev. 186; 6 T. R. 602; Stra. 1111.*

XI. LETTERS OF ADMINISTRATION, HOW PROVED IN EVIDENCE.

1. *GARRETT v. LISTER.* E. T. 1660. K. B. 1 Lev. 25; S. C. 1 Keb. 15. S.

P. ELDEN v. KEDDELL. H. T. 1807. K. B. 8 East. 187.

In this case no letters of administration were produced; the only evidence to prove that they were granted was the book of the Ecclesiastical Court, from which it appeared that an entry had been made by an act or order of the Court for granting the administration; and this evidence was holden sufficient to prove that the letters had been duly granted. *See Bul. N. P. 246; 2 M. and S. 567; 1 Phil. Ev. 319.*

2. *KEMTON DEM. BOYFIELD v. CROSS.* E. T. 1735. K. B. Ca. Temp. Hard. [261] 103; S. C. Com. 161.

In ejectment, for the rectory of W.; the plaintiff made title, under a term of years, from the administrator of E. S. with the will annexed, but he did was held that the matter did not come legally in question before the court; and that the party ought to bring an *audita querela*. *Polnell v. Brook, T. T. 1654. Sty. 417.*

* *See Taylor v. Diplock, 2 Phil. Rep. 261.* where it was held, that if the husband appoint his wife executrix, and they both perish at the same moment, administration shall be granted to the representatives of the husband. *See 2 Salk. 593.*

But it may be obtained to enforce a grant of administration to the next of kin notwith standing a suit pending if the consanguinity of the applicant be not denied.

The grant of administration may be proved by the book of the Ecclesiastical Court wherein the grant is entered;

Or by a certificate from the Ecclesiastical Court stating the grant.

not produce in evidence the letters of administration themselves, but only an exemplification to the following effect: To all christian people to whom, &c. greeting; know ye, that having searched out registers and acts, &c. we have discovered that on the day of a power was issued to to administer the goods of deceased, according to his will, because no executor thereof was appointed, the tenor of which will here follows (setting out the will *verbatim*.) Given under our archiepiscopal seal, &c. Which the judge of assize allowed as good evidence; and verdict for the plaintiff. On a motion for a new trial, it was objected that the certificate or exemplification was not sufficient evidence to prove the administration, but that the book wherein those acts were registered ought to have been produced, as in 1 Lev. 25. and S. C. in 1 Keb. 15; Garrett and Lister, and in Peaslie's case, 1 Lev. 101; and 1 Keb. 509; whereas this is only a recital of administration in exemplification of a will. *Lord Hardwick, C. J.* The granting administration is the act of the Ecclesiastical Court, who are the proper judges. The proof of that act is by the commission itself, which can only be denied by denying the seal, or by a copy of the act of Court, or by an exemplification thereof. Now this exemplification does not exactly correspond with the forms of exemplification, in this court, for here we set out the record in *hæc verba*, and this is only a recital of the fact. But, however, it imports an *inspezimus*, so that I think it will depend on the manner of exemplifying in the Ecclesiastical Court; for if this is their form, I should think in substance it is well enough.

At another day, several persons from Doctor's Commons attended, who declared that the custom was always in the Prerogative Court, in exemplifications of general administrations, to set out letters of administration in *hæc verba*; but in case of special administrations, as administrators with the will annexed, like that under discussion, they recite the entries in their books, and set out the will *verbatim*; and their affidavits to the same purpose were read, and they produced two exemplifications with the will annexed, upon the executors renouncing, which were also in the same form, and one was dated in 1729, and the other in 1732. So the Court thought the evidence was properly allowed at the assizes, and refused a new trial.

3. DAVIS v. WILLIAMS. H. T. 1811. K. B. 13 East. 232. S. P. *REX v. CLARK.* id. 238. n. a.

Act book is evidence that defendant is administrator, with out notice to produce the letters of administration.

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To prove that the defendant was administrator of E. W. an examined copy of the act in the registry of the Prerogative Court of Canterbury was produced, and the witness who proved it on the trial stated that he had applied for a copy of the letters of administration, and that the deputy-registrar's clerk had ordered the present abstract to be given, which was subscribed with the signature of the three deputy-registrars. It was objected that this was merely secondary evidence, and not admissible without notice having first been given to the defendant to produce the letters of administration; but this argument was met by the suggestion that the document produced was the act of the court granting the administration, which was evidence *per se* of administration having been granted. In this opinion the Court concurred, and judgment was entered for the plaintiff. *See Eldon v. Keddel*, 8 East. 187.

4. HUNT v. STEVENS. T. T. 1810. C. P. 3 Taunt. 113.

On producing letters of administration they must appear to be properly stamped, or they will be of no avail. *sed vide infra*;

In trover by the plaintiff, as administrator of C. for property estimated to be worth 1300*l.* it was shown by a copy of the bond given to the ordinary, and entered on the books of the proper officer of the Prerogative Court, that he had taken out letters of administration to the deceased upon a stamp for a value not exceeding 1000*l.* Verdict for the defendant. On a motion for a new trial it was contended, that under the plea of not guilty it was unnecessary for the plaintiff to have proved his right to the claim of the special character of administrator at all, but that the defendant, if he had been desirous of raising that question, should have pleaded specially, negating the title assumed by the plaintiff; and that, even if the argument should fail, it would suffice, even after judgment, to take out letters of administration for a larger sum. *Sed Per Cur.* The question of the plaintiff's right to sue as administrator is clearly raised by the plea of not guilty, and it was compulsory upon

him to establish his right to that character.* The 48 Geo. 3. c. 149. s. 8 expressly interdicts the admission of any letters of administration in evidence, which are unduly stamped. If the argument which has been urged for the plaintiff was apportioned by the Court, the result would be, that administration taken out for a small sum would be as operative as if taken out for a sum co-extensive with the real value of the property. Rule for a new trial discharged.

5. *WATSON v. KING*. M. T. 1815. N. P. 4 Camp. 272; S. C. 1 Stark. 121. not S. P. The plaintiff declared in trover as administrator of M. with a profert of the letters of administration. For the defendant it was contended, that under the plea of not guilty the plaintiff was bound to produce the letters in evidence, the conversion having been stated to have been committed after the intestate's death. *See per Lord Ellenborough*. It must be assumed, until the contrary is established by the defendant, that the letters of administration are sufficient, and warrant the plaintiff in adopting the title of administrator.

6. *THYNE v. PROTHOROE*. E. T. 1814. K. B. 2 M. & S. 553.

To a special action of *assumpsit* by the plaintiff, an administrator, the defendant pleaded the general issue. Notice had been given by him to the plaintiff to produce the letters of administration, which, when produced on the trial, appeared to have been obtained for a less sum than the value of the subject matter of the present action. The plaintiff was accordingly nonsuited, and on a motion for a new trial, it was said, *Per Cur.* That under the plea of *non assumpsit*, the admission of the letters of administration at all in evidence was improper and unnecessary; and that the defendant could not, under that plea, avail himself of the inadequacy of the stamp. Rule absolute for a new trial.

7. *THOMPSON v. DONALSON*. M. T. 1799. K. B. 3 Esp. N. P. 63.

In an action on a policy of insurance, it appeared that one D. in whom it was alleged the interest was vested, was dead at the time of effecting the policy, and to prove his death, letters of administration were produced; but *Lord Kenyon, C. J.* rejected them, observing that the mere production of the letters of administration was not sufficient evidence to prove the death of the party, such letters being frequently obtained surreptitiously during the existence of the supposed intestate. *See Blackham's Case*, 1 Salk. 290; 11 St. Tr. 261

8. *NOELL v. WELLS*. M. T. 1667. K. B. 1 Sid. 359.

Per Cur. If letters of administration be shown under seal, you may give in evidence that they were revoked, for this is an affirmation of the proceedings in the spiritual court, and does not at all controvert the accuracy of their decision; or the adverse party if the administration be granted by an inferior court, may prove that the testator left *bona notabilia*, for then the Court had no jurisdiction.

XI. NEW LETTERS OF ADMINISTRATION, WHEN GRANTED.

BARTON, ADMINISTRATRIX, OF DOBSON, v. FULLER. M. T. 1695. K. B. 1 Comyn, 18.

The declaration was of M. T. and it appeared from the letters of administration that they had been granted subsequent to the commencement of the action. *Per Cur.* If the administration be granted, and the letters of administration are lost, new letters of administration may well be granted after the action is commenced; but it is otherwise if they are then originally granted. *See Toller, L. Executor*, 78.

Admtral.—*See tit. Navy; Prize.*

* But see *Mansfield v. Marsh*, 2 Lord Raym. 824. where Holt, C. J. refused in trover by an administrator, where the property was laid in the intestate, to admit evidence on not guilty, to show that the plaintiff was not administrator, saying that the plaintiff should have pleaded it. And so in *Goldby v. Williams*, 1 Salk. 38. and Com. Dig. Pleadar. 2 D. 10. 2 D. 14. it is laid down that the plea of *non est factum* admits the plaintiff to be a good administrator.

But where the plea admits the plaintiff's right to sue in the character he has assumed, the letters of administration need not be produced. And if they are produced, the defendant cannot object to them as not properly stamped.

Letters of administration, unsupported by other evidence, are not proof of the death of a party. When letters of administration are shown under seal, evidence of their being revoked may be given; or it may be shown that the intestate left *bona notabilia*. If letters of administration are lost, new ones may be granted after action brought.

[254] **Admiralty, Court of.**—See also tit. *Hypothecation ; Impressment ; Judgment ; Jurisdiction ; Navy ; Prize ; Prohibition ; Ship and Shipping.*

I. JURISDICTION AND POWER OF, IN CIVIL CASES.

(A) IN SUITS FOR MARINERS' WAGES, p. 264.

(B) IN OTHER CASES, p. 271.

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I. JURISDICTION OF, IN CIVIL CASES.

(A) IN SUITS FOR MARINERS' WAGES.

1. ANONYMOUS. T. T. 1670. K. B. 1 Vent. 146. S. P. ANON. H. T. 1679. K. B. 2 Show. 86. *OPY v. CHILD.* E. T. 1693. K. B. 1 Salk. 31. *BATLY v. GRANT.* 1699. K. B. 1 Salk. 33. *HARDING v. BROOKE.* E. T. 1693. K. B. Comb. 255.

Mariners' wages may be recovered in the Court of Admiralty and the law of marine adjudges when they are for feited; Though there be a contract or charter party made for them upon land. See *vide infra.* But not if the contract be under seal, or of an unusual kind.

The Court refused a prohibition to restrain the admiralty from proceeding in a cause for the recovery of mariners' wages, though the contract was made on land, observing that it was more convenient for them to sue there, because they might all join, and that, according to the marine law, if the ship perished as the mariner's default, they would lose their wages, and that the cause ought to be allowed to proceed there.

2. *COKE v. CRETGHET.* T. T. 1681. K. B. 3 Lev. 60.

Upon a motion for a prohibition to stay suit in the admiralty for mariners' wages, it was suggested that the suit was founded upon a charter party, which was made on land, and not upon *allum mare*. But the prohibition was refused, for mariners' wages grow due to them for labour done at sea, and the charter party and contract at land is only to ascertain the amount. See 1 Salk. 3 ; *Com. Dig. Admiralty, E. 15.*

3. *OPY v. CHILD AND OEHERS.* E. T. 1692. K. B. 1 Salk. 31 ; S. P. *CAMPION v. NICHOLAS.* M. T. 1720. 2 Stra. 405.

On a motion for a prohibition to the Court of Admiralty, in a suit pending there for mariners' wages, on a suggestion of a contract made for them on land, *Per Cur.* For the convenience of seaman, the Admiralty has been allowed to hold suit for mariners' wages ; but subject to this limitation, that if there be any special agreement by which the mariners are to receive their wages in any other mode than is usual, or if the agreement be under seal, so as to be more than a parol agreement, in such case a prohibition shall be granted, and it must be conceded in this case.

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4. *BURNS v. PARRE.* M. T. 1705. K. B. 2 Lord Kaym. 1206.

To oust the Admiralty of its jurisdiction, it must be expressly shown that the contract was by deed; Though an allegation that the contract was made

A prohibition was moved for to stay proceedings in a suit in the Court of Admiralty for seamen's wages, on a suggestion that the contract was made by deed on shore. But on reading the suggestion it appeared to contain a mere general statement that the contract was made at land. The Court directed the suggestion to be amended, and it was then shown that the contract was in writing ; but *Per Cur.* It is insufficient, for the agreement might be in writing and yet not be by deed : and if it was in writing, that would not alter the case ; for notwithstanding the writing, it is but a parol contract.

5. *SMITH v. CROSBY.* E. T. 1689. K. B. Fortescue, 230.

A seaman sued in the Admiralty Court for his wages, on a contract with the freighter ; and the libel alleged that the agreement was entered into between the ebbing and flowing of the sea. It was contended that the libel ought to state the contract to have been made on the high seas.

Per Holt, C. J. In this instance it need not be so, because in the case of on the high wages they must sue in the Admiralty, though the contract be not on the high seas is unnecessary; and where the question is concerning the payment of wages, it is proper enough to be sued in the Admiralty Court.—Prohibition refused.

6. ANON. M. T. 1678. K. B. 1 Vent. 343.

Upon a motion for a prohibition to the Court of Admiralty, upon a suggestion that the suit was instituted there upon a contract made upon land; it appeared that a bargain had been made with several seamen, to bring up a ship from a port in England to London, for a certain sum to be paid to them. In support of the prohibition it was alleged, that this being upon the land, and a contract jointly, with several, for a sum in gross, it could not be within the ordinary rules respecting mariners' wages, which is permitted to be sued for in the Court of Admiralty, in favour of the mariners, because they may all join in that Court, and not be put to the inconvenience of suing severally, as they must at law; but from the nature of this contract they might sue jointly at common law. *Per Cur.* The prohibition must be refused, for this must be taken as mariners' wages; therefore, though the contract was made upon land, yet they have jurisdiction. Besides, as the party comes after sentence, it is in the discretion of the Court whether they will then grant a prohibition.

7. BAYLY v. GRANT. 1699. K. B. 1 Salk. 33; S. C. 12 Mod. 440; S. C. 1 Ld. Raym. 632; S. C. Holt, 48. S. P. HOOK. v. MORETON. M. T. 1697.

K. B. 1 Ld. Raym. 397.

The mate sued the master for his wages in the Admiralty, and this Court was moved for a prohibition, because the master himself could not sue there, and the mate was not in nature of a mariner, but was to succeed the master if he died on the voyage. *Per Holt, C. J.* The master contracts with the owners, but the mate contracts with the master for his wages, as the rest of the mariners do. Prohibition denied.

8. ALLESON v. MARSH. T. T. 1689. C. P. 2 Vent. 181.

A prohibition was prayed to the Admiralty, to stay a suit commenced there by some of the mariners of a ship against two of the part owners, for their wages, upon a suggestion that the contract was made with them upon land. *Per Cur.* As the Admiralty Court has jurisdiction, we must deny the prohibition, although the plaintiffs have employment in the ship, as purser, boatswain, and the like; they are mariners as well as others, and may sue in the Admiralty Court for their wages; and, having jurisdiction, can proceed in their own way, though different to our law, as to the joining plaintiffs and defendants; and if the proceedings be not according to their law, the remedy lies here.

9. MADOX v. ———. T. T. 1700. K. B. 12 Mod. 526.

On a motion for a prohibition to stay a suit in the Admiralty brought by a surgeon of a ship for his wages, the suggestion was, that all was paid to the master. *Per Cur.* Payment to the master is not payment to the seamen; but the ship itself is liable for their wages. *See the Lord Hobart, 2 Dod. 164.*

10. WHEELER v. THOMPSON. T. T. 1738. 1 Stra. 707; S. P. CREED v. MALLET. M. T. 1741. Forts. 231.

On a motion for a prohibition, it was held that a carpenter might sue for wages in the Admiralty Court.

11. RAGG v. KING. H. T. 1729. K. B. 2 Stra. 858.

A prohibition was applied for to restrain proceedings in a suit for wages by the master, in the Admiralty, but denied; as the boatswain is to be considered as a common mariner.

12. ROSS v. WALKER. T. T. 1765. C. P. 2 Wils. 264.

A pilot was sent for to Gravesend, to attend on board the ship Oxford being in Sea Reach, who accordingly went on board of her there, and piloted her from thence to her mooring at Deptford; and for his wages due to him upon that account instituted a suit in the Court of Admiralty. A motion was made for a prohibition, upon a suggestion that both the contract and the work performed were within the body of the county, and an affidavit was

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produced that Sea Reach is within the body of the county. In support of the application, it was contended, that as it was clear that both the contract and the labour were within the body of the county, the Admiralty had no jurisdiction in this case; yet that it must be admitted, that if the contract be at land for an intended voyage, and the mariners go on board, rig the ship, &c. though the voyage never proceeds, the Admiralty shall have jurisdiction; but where both the contract and the whole voyage or work are within the body of the county, as they are in the present case with respect to the pilot, the Admiralty has no jurisdiction. *Per Cur.* We are much inclined to favour the pilot, if we could do it without breaking through the rules of law; because it would be for the benefit of trade, and save great expense to these poor men; it is established that every officer and common man who assists in navigating the ship (except the master), even the surgeon, is a mariner, and may sue for wages in the Court of Admiralty; for the surgeon preserves those who preserve the ship, and whether he is to be paid a gross sum, or so much per month, it is the same thing. Though both the contract and work done on board in the case of Wells and Osman, 6 Mod. 238. were within the land; yet that case was very rightly determined, because the contract was to manage the ship for an intended voyage, which did not proceed on account of some disagreement among the owners; the mariners were in no fault; and the true reason why seamen may sue for their wages in the Admiralty, though the contract be at land, is, that *there* the ship itself is made liable to them, and besides *there* they may all join in the suit, neither of which can be done at common law; and yet much for the case of poor seamen. But there is no instance to be found where the contract was at land, and to do the work on board within the body of some county, that the common law courts have ever permitted the Admiralty to have jurisdiction, and that is this case; the contract with the pilot was made at land; and to do work within the body of the county, and not at sea or upon a voyage; and though it is and must be laid in the libel that they were both on the high seas, yet we must now take the suggestion to be true, that both the contract and the work were at land. A prohibition was granted, *per totam Curiam.* See *Lit. Rep.* 166; *Ashton's case*, 2 Brownl.; *S. C. Hob.* 213; 4 *Inst.* 136. &c.; *Goddolt.* 261; 2 *Ld. Raym.* 1044; 6 *Mod.* 238; *S. C.* 12 *Mod.* 400.

13. CLAY v. SNELGRAVE. T. T. 1699. K. B. 12 Mod. 405; *S. C.* 1 *Ld. Raym.* 576; *S. C.* 1 *Salk.* 33; *S. C.* Carth. 518. RAGG v. KING. H. T. 1729. K. B. 2 *Stra.* 858; *Barnard.* K. B. 297.

But not by the master for his contract is founded upon the credit of the owners not of the ship."

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The administrator of a master libelled against a ship for the master's and seaman's wages; and a prohibition was moved for, on a suggestion that the contract was made on land. *Per Cur.* The suggestion is nothing, in the case of a suit for seamen's wages only, but the doubt is as to the master. For it is by indulgence that seamen may sue for their wages in the Admiralty, but that was never extended to masters but once, which was in Lord Herbert's time, for the master's case differs from that of the mariners; for he is a principal servant, and contracts with the part owners, and the mariners with him. A prohibition is a matter of right, with some restrictions; the ground for a prohibition in most cases is the circumstances of the contract being made on land. In the case of a local jurisdiction, as that of the Admiralty, there is no difference between the contract being by deed and by parol, consequently we grant a prohibition. See *Ho.* 212; 12 *Co.* 78; 2 *Wils.* 264; *Doug.* 101; 1 *Vent.* 146; 2 *Stra.* 858; 4 *Burr.* 1950; 3 *T. R.* 267; *Ray.* 3; 3 *Lev.* 60; 2 *Rob.* 237.

Seamen may sue in the Admiralty Court for their wages earned in fitting out a ship for a voyage,

14. WELLS v. OSMOND. M. T. 1703. K. B. 6 Mod. 238; *S. C.* 2 *Ld. Raym.* 1044. S. P. MILLS AND ANOTHER v. GREGORY. Sayer. 127.

On a motion for a prohibition to the Admiralty in a suit pending there for the recovery of seaman's wages, it appeared that the plaintiff had built a ship and launched her and afterwards, a treaty between him and one B., who was to buy the ship, in order to be master of her (as is usual in such cases), but

* But if the mate become master during the voyage, he may sue in the Admiralty for the wages due to him in the former capacity, but not in the latter. *Bead v. Chapman*, 2 *Stra.* 937.

before any bill of sale was executed by the plaintiff to him, B. hired Osmond and other seamen to launch and rig the vessel, and to go with him a stipulated voyage, and sent for them on board the ship, and Wells permitted them to come on board; and there the seamen continued for four months, fitting her out for sea; but afterwards, on some difference between B. and the plaintiff, the treaty for the ship was broken off, and the things removed from on board the ship, and the seamen discharged, having never been with her any lower than Deptford, where she lay when they went on board; and now the seamen libelled in the Admiralty against the body of the ship for their wages; and on suggestion that the work and labour was done within the body of the county, the Court was moved for a prohibition, on the ground that though here was a voyage intended, yet no voyage having been made, the mariners could not sue in the Admiralty for their wages. *Per Cur.* If a contract be made with seamen to go a voyage, and they, consistently with their duty, work in a harbour, and afterwards the voyage is interrupted through the owner's fault, as if the ship be arrested for his debt, &c. the seamen are entitled to sue in the Admiralty for their wages; but otherwise, if the retaining of them had only been to do the work in the harbour. In this case, however, the ship ought to be liable for their suit, because the builder, by putting her into the purchaser's possession gave him an opportunity of engaging with seamen, who were the more easily induced to confide in him, because they saw him in possession of the vessel; and they being strangers to the builder's bargain with the owner, ought not to suffer by its not being performed; for the builder might have taken care to secure himself from any such charge when he entrusted the owner with possession of the ship, whereby he rendered it subject to the wages of such seamen as he should bring on board in order to navigate in her. Prohibition therefore refused. *See 3 Lev. 60; 3 Keb. 552; 2 Wils. 264; 4 Burr. 1945; Stra. 707; 1 Lath. 33; Com. Rep. 74; Ld. Raym. 398; 1 Holt, Shipping, 463.*

15. ANON. M. T. 1678. K. B. 1 Vent. 343.

Motion for prohibition, upon a suggestion that the suit was upon a contract made on land. It appeared that an agreement had been entered into with several seamen from a port in England to the port of London; but the Court refused the application, observing, that the arrangement was sanctioned by maritime usage; and that the application being after sentence, the Court might refuse or grant it at its discretion.

16. BROWN v. BENN AND ANOTHER. E. T. 1705. 2 Ld. Raym. 1247.

A motion was made for a prohibition to the Court of Admiralty, in a suit there by seamen for their wages, upon a suggestion that the Court had refused to allow the defendant's allegation, that the place upon the arrival at which the plaintiffs claimed to be entitled was not a port of delivery; and that they had refused to receive the allegation, unless the defendant would bring the money demanded into Court. But it was held, *per Cur.* that the Admiralty Court were the judges of that question, and if they did not do the defendant right, his only remedy was by appeal, but it was no ground for a prohibition: that the jurisdiction of the Court of Admiralty, in case of seamen's wages, was an ancient concurrent jurisdiction, as ancient as the constitution itself.

17. EDMONSON v. WALKER. M. T. 1690. K. B. 1 Show. 177.

Upon a motion for a prohibition it appeared that the defendant had libelled in the Admiralty Court, as executor to her husband, late master of a ship; that the vessel and apparel had been decreed to be sold for the payment of the master and the seamen's wages. By a supplemental bill, the defendant surmised that the plaintiff was in possession of certain sails belonging to the ship, which by the decree were to be sold, and the plaintiff to have been admonished to render an account of the particulars thereof, and to deliver them to J. C. the marshal of that court, that they might be sold according to the decree. But that the plaintiff had neither given an account, nor delivered the sails; and therefore prayed that he might be attached *donec, &c.* That

though he does not actually proceed on the intended voyage.

They may likewise sue in the same court for the wages of a coasting voyage as for navigating a vessel from one port in England to another.

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And if the subject come before the Court of Admiralty that Court may decide whether at a place at which a ship shall have arrived, be such a determination of the voyage as to entitle these seamen to their wages. The Admiralty may order the ship, sails, and tackle to be sold to pay the seamen their wages.

the plaintiff had then tendered an account of the main-sails, two fore-sails &c. and decreed to be attached until he had delivered them. *Per Cur.* Mariners' wages are within the jurisdiction of the Admiralty Court; they may sell the ship, and the sails and tackle are part of it, and remain part of it when they are on shore. The ship itself is at land when in harbour, it is *infra corp. com.*; and therefore that is no cause for a prohibition. And as to the cases of trespass done *infra com.*, it is true they are out of the jurisdiction, but here is only a condemnation of it, as an accessory or appurtenance; and as to the property, the Admiralty will and must allow it if you come in and plead it; if otherwise, he will prohibit them. *See 2 M. R. 649; 4 T. R. 382; 2 Saund. 250; 1 Sid. 367; 1 Lev. 243; Doug. 614; Cowp. 424; 1 Vent. 174; 1 Roll. Ab. 529; 4 Inst. 154; Bumb. 121; Hob. 212.*

18. *HOOK v. MORETON.* M. T. 1697. K. B. 1 Ld. Raym. 397.

Seamen may sue jointly or severally in the Admiralty.

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Motion for a prohibition, to be directed to the Admiralty Court, to stay a suit on a libel, by the mate of a ship, for mariners' wages, on suggestion of several statutes, which restrain the Admiralty from proceeding on contracts made on land. Against the issuing of the prohibition it was argued, that if all the mariners sue for their wages in the Admiralty, this Court will never grant a prohibition, and there is no difference where the suit is brought, by one mariner or by several. *Per Cur.* There is no difference; for the reason why this Court permits mariners to libel in the Admiralty for their wages is, not only because they are privileged to join in the suit in the Admiralty, when they would be obliged to sever at common law, and because the contracts are several, but also because by the maritime law mariners have a security in the ship for their wages, arising out of an implied hypothecation to them. *See 13 Rep. 51; 1 Sid. 351; 1 Inst. 141; 1 Vent. 343; 12 Co. 77; 2 Roll. Ab. 318; 2 Vent. 281.*

19. *DAY v. SERLE.* E. T. 1733. K. B. 2 Barnard. 419; S. C. 2 Stra. 969.

A prohibition will be granted if there be any thing special in the agreement.

A motion was made for a prohibition, founded upon an allegation, that the contract with the seamen was of a special description, and made on land, and sealed and delivered by the parties; and that the defendant in the Court of Admiralty had offered to prove the speciality, and had alleged the existence of the deed, but that the judges of the court had altogether refused to receive the plea and allegation. Upon these grounds the prohibition was accordingly granted by the Court of King's Bench. *Lord Hardwicke, C. J.* said, that as the Admiralty Court proceeds in suits for mariner's wages upon contracts made at land, which cannot be the proper cognizance, of the maritime jurisdiction, merely by indulgence, a prohibition would always be granted where the contract differed from the common and usual contracts between masters of ships and seamen about wages, by reason of some special terms contained in it, and that in this agreement there seemed to be some special covenants, as for example, 1st, That if the mariners should enter into any of his majesty's ships of war, that they should forfeit their wages, which was directly contrary to a clause in the late act. And, 2dly, That when the agreement was by writing signed and sealed, then also a prohibition should go, which was likewise in the present case.

Where a deed has been obtained by fraud, the Court of King's Bench will not prohibit a suit for wages in the Admiralty, nor will they prohibit where the deed does not immediately relate to wages.

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Or if the deed be pleaded &

20. *BUCK v. ATTWOOD.* E. T. 1626: K. B. 2 Stra. 761.

Suit in the Admiralty Court for wages, and a deed there pleaded to have been made on land, by which the mariners agreed to forfeit their wages, on particular circumstances; the plaintiff replied that the deed was obtained by fraud and circumvention; and the Court of Admiralty declaring it to have been so obtained, gave sentence for the plaintiff to recover his wages. The Court of King's Bench refused the prohibition, and said in substance that the object of the deed was confined to certain circumstances under which the seamen were to forfeit their wages, but could not enable them to sue for their wages at law; the deed, therefore, was only an incident; and as such, might be collaterally taken as part of the proceedings in the Court of Admiralty.

21. *SMART v. WOLFF.* T. T. 1789. K. B. 3 T. R. 348.

Per Buller, J. Where a deed is pleaded, a prohibition may be granted

on account of a defective trial, because we all know that the Admiralty Court insists on two witnesses to prove it, whereas the common law courts only require one, but we cannot interpose unless that defect be shown; for there, as well as in the Ecclesiastical Courts, if a deed or release be admitted, that Court may proceed; and if that party submit to trial, he cannot afterwards apply for a prohibition.

22. EDMONTON v. FRANKLYN. E. T. 1742. Forts. 231.

The plaintiff had been libelled in the Admiralty for seamen's wages, and they had at the same time sued him at law; and an issue being joined, a prohibition was moved for. *Sed per Cur.* You ought first to have pleaded the pendency of the prior suit in the Court of Admiralty before you apply here for a prohibition. *Sed vide ante*, 22.

(B) IN OTHER CASES.

1. WOODWARD v. BONITHAN. H. T. 1659. K. B. T. Raym. 3.

The master of a ship agreed with certain merchants concerning a voyage, and received orders from them to provide provisions and obtain mariners; and after the voyage was finished the merchants refused to pay the master of the ship with whom they had agreed; upon which refusal he libelled them in the Court of Admiralty. Upon a motion for a prohibition, on the ground that the Admiralty Court has no jurisdiction, as the contract was made on land; it was said *Per Cur.* A prohibition well lies. *See 4 Inst.* 134. 135; 2 *Lev.* 182; 1 *Com. Dig. Admiralty*, F. 1.

2. ANON. E. T. 1676. K. B. 1 Vent. 308.

Libel for a ship taken by pirates and carried to Tunis, and there sold. A prohibition was prayed for, on the ground that the ship was sold at land, and the Court had no jurisdiction.

Per Cur. As the vessel was taken by pirates, and originally within the admiral's jurisdiction, it continues so, notwithstanding the sale afterwards at land; but the rule is otherwise where the ship is taken by enemies, for that alters the property; no mention, however, being made in the libel that the ship was taken *cupra altum mare*, and though there was sufficient to raise such an implication, yet the court held an averment to this effect to be absolutely necessary to support the jurisdiction.

3. SANDS v. EXTON. T. T. 1682. K. B. 2 Show. 303; S. C. T. Raym. 488.

S. C. Skin. 91.

Upon a motion for a prohibition it appeared from the suggestion that an order had been issued, founded on a warrant from the king and council, to stay the plaintiff's ship, until he gave security not to go to particular places specified in the East India Company's charter. But the Court were of opinion, that there being no libel or suit pending in the Admiralty, a prohibition could not be granted, for it was no point of jurisdiction; if they stop

* It may be useful to subjoin a note containing the summary provisions given by the 59 Geo. 3. c. 58. for the more expeditious recovery of seamen's wages by the adjudication of a justice of the peace. This act recites that seamen and mariners employed in the merchant service, and in the coasting trade of this kingdom had been exposed to great difficulties, expense, and inconvenience, in suing for and obtaining payment of their wages, in cases of dispute with the masters or owners of vessels in which they had served. The act then recites that it was expedient that greater facility should be given for the recovery of such wages. It then empowers justices of peace, on the complaint of seamen, to hear and settle disputes about wages not exceeding twenty pounds. And if the owners or masters shall refuse to comply with the determination of the justices, the amount of wages which they shall adjudge to be due may be levied by distress upon their goods and chattels. And the determination of the justice or justices is to be final, unless an appeal be interposed by either party to the High Court of Admiralty, within the space of seven days after the order made. The act provides, that if seamen or others are dissatisfied with the order of the magistrate, they must give notice of their intention to appeal to the High Court of Admiralty within forty-eight hours after the order made. A motion is to be taken out against the adverse party within 30 days; and good and sufficient bail in double the amount of the wages claimed, must be given before a commissioner of prizes, or the justice who shall have pronounced the order. This bail is to be certified according to a form given in the schedule, and transmitted without delay to the High Court of Admiralty. Seamen, however, are not to be precluded from the benefit of any agreement entered into before the passing of the act, nor of any other remedy to which they may now resort.

admitted, the Court may proceed.*

When there is a suit pending in the Admiralty and at law for the wages, instead of applying for a prohibition, the pendency of the suit in the Admiralty shall be pleaded. The master of a ship cannot sue the owners in the Admiralty upon a contract made on land.

[272] When a ship is taken by pirates within the jurisdiction of the Admiralty, it continues so, notwithstanding a sale afterwards on land.

The King's Bench will not prohibit the

Court of Admiralty from proceeding on an order of council.

a ship by order, and illegally, an action lies, and what they had done was not in execution of any sentence, it being only in pursuance of the king's warrant.

4. *KNIGHT v. PERRY*. E. T. 1688. K. B. Comb. 109; S. C. Carth. 24.

Upon a prayer for a prohibition to the Admiralty Court, it appeared that there were several part-owners of a ship; the major part of them had sent the ship out to sea without the consent of the rest; the others libelled in the Admiralty Court, that the major part should give security for the return of the ship. The vessel being ultimately lost at sea, the executor of one of the contractors was libelled on this agreement, and decreed to pay *Sed per Cur.* Although by the Admiralty law an executor is liable, still we are of opinion that this stipulation being matter done on land, the Admiralty has no jurisdiction over it. Notwithstanding it has been urged that it was the constant course of the Admiralty to proceed on such stipulations, yet such general usage cannot prevail against the statute of Hen. 4. Prohibition granted.

5. *THE KING v. PERRY*. E. T. 1688. K. B. 3 Salk. 23. *S. P. WICKS v. STRUT*. E. T. 1694. K. B. Comb. 320. *PAR v. EVANS*. E. T. 1663. K. B. T. Raym. 78. *Per Holt, C. J.* An obligation taken in the Admiralty to appear and sue there, is suable in that Court, for it is a stipulation in nature of bail at common law. See 2 *Lord Raym.* 1286.

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Where there is a capture of goods at sea, the plaintiff's election.

6. *ANON.* H. T. 1690. K. B. 12 Mod. 16.

Per Cnr. Where there is a false capture of goods at sea, the admiral has jurisdiction. But if they be brought to land, the common law has equal authority; and the cause may be brought in either court at the plaintiff's election. Admiralty has jurisdiction; if brought on land, either admiral or common law have, at the plaintiff's election.

7. *WILSON v. BIRD*. M. T. 1693. K. B. 1 Ld. Raym. 22.

Where the master of a captured vessel gives himself up as a hostage, and the owner neglects to pay, he may proceed again tthe ship in the Admiralty Court for his redemption. The Court of Admiralty has authority to arrest a ship upon the application of a part owner until security be given by other part owners, but not to direct a sale of the ship.

A ship was libelled in the Admiralty Court, which stated, that the master, being taken by a French privateer, had ransomed the ship for 300*l.* and had sued for the payment of it, and was carried prisoner to Dunkirk, and that the money was not paid, &c. and sentence was given in the Admiralty against the ship; and the Court of King's Bench being moved for a prohibition, it was refused by *Holt, C. J.* Because the taking and pledge being on the high seas, the ship, by the law of the Admiralty, must answer for the redemption of the master.

8. *OUSTON v. HEBDEN*. T. T. 1745. K. B. 1 Wils. 101. *S. P. LAMBERT v. AERETREE*. E. T. 1696. K. B. 1 Ld. Raym. 223. *BLACKET v. ANSLEY*. T. T. 1696. K. B. 1 Ld. Raym. 235.

This was an application to the Court for a prohibition; the defendant, who was a part owner of the ship Scarborough, having procured a warrant from the Admiralty, and arrested her in port. It appeared that the ship was built at Scarborough; that the builder sold one-third part of her in sixteen parts, retaining the other two-thirds of her to himself; that the whole ship was worth about 500*l.*; that the builder mortgaged his two-thirds and died; and that his widow and representative sold the same absolutely to Ouston, who was now the master, as well as the owner of two-thirds; that this sale to Ouston, was made without the consent of the other part owners, and without any security given to them by Ouston; that he being master and chief part owner, insisted upon going a voyage against the will of the part owners; that he refused to pay them for their shares (they desiring not to continue any longer part owners with him) or to sell the ship and distribute the money among them in proportion; and the libel in the Admiralty concluded by

* But when the shares are not ascertained, the Court of Admiralty has no jurisdiction; and in such case the Court of Chancery will exercise a concurrent jurisdiction by an injunction restraining the sailing of the ship until the share of the party complaining be ascertained, and security given to the amount of it; and in such cases the Court will refer it to the master to make an inquiry, and settle the security accordingly. But in all such cases, the application to the Court of Chancery must be as expeditious as possible; and an injunction was lately refused to restrain the sailing of a ship upon the application of a part owner, where the ship was in preparation for sailing the following day, and there were no circumstances to account for the delay in the application. See *Holy v. Goodson* 2 Merv. 77; *Christie v. Craig*, 2 Merv. 137.

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praying that the ship might be sold, or that they might have such other remedy as the Court thought proper. Ouston, in his answer to the libel, alleged that Hebden's share was not worth more than 50*l.*; that the remaining parts were worth 450*l.*; that the other part owners agreed to his (Ouston's) purchase, and did not insist upon his giving security before the institution of the suit in the Admiralty; he further alleges that there was no such usage as set forth in the libel, for the Court of Admiralty to sell the ship; and he insisted that the ship ought to be allowed to proceed on her voyage; and suggested for a prohibition that the Admiralty had no jurisdiction in ships in part. *Lee, C. J.* Generally speaking, the Court of Admiralty has no jurisdiction of matters or contracts done or made on shore, but this particular case must be determined upon the whole of the facts as they appear upon the pleadings. Now the libel concludes with praying that the ship may be sold, &c. or that the party libelling may have such other remedy as the Admiralty Court shall think proper. I have no doubt that that Court has a power in this case to compel a security; for this is a proceeding *in rem*, and not *in personam*; and this jurisdiction has been allowed to that court for the public good, as is confirmed by the case from Fitzgibbon, where it is said that courts of law have allowed it. Indeed, the Admiralty has no jurisdiction to compel a sale; and if they should do that, you might have a prohibition after sentence, or we may grant a prohibition against selling or compelling the party to sell, or to buy the shares of the others, which was agreed to *per totam Curiam*, and the rule as to that was made absolute; but as to compelling a security to be given, the rule discharged. *See Rol. Ab.* 530; *Fitz.* 192; *Raym.* 78; 6 *Mod.* 162; *Stra.* 890; *Fitzgib.* 197; *Camb.* 109; *Raym.* 55; 1 *Lev.* 29; 1 *Keb.* 38; *Co. Lit.* 200; *Carth.* 26.

9. *RIGDON V. HEDGES.* M.T.1697. K. B. 12 *Mod.* 246; S. C. 1 *Ld. Raym.* 446. Goods were arrested in the river Thames by a process out of the Court of Admiralty; and a rescue being made, a warrant was issued against Rigden for contempt of the Admiralty process; and on a motion for a prohibition, it was suggested, that the original process was founded on an act out of their jurisdiction, and consequently the party could not be guilty of contempt. *Sed per Holt, C. J.* If a ship be arrested by process out of the Court of Admiralty, for a matter arising within their jurisdiction, though she be rescued at land, the connasance of the rescue belongs to the Admiralty.

If a ship arrested by Admiralty process within their jurisdiction be rescued, they may re-seize her on land. Fees cannot be sued for in the admiralty.

10. *CLERK V. LEE.* M. T. 1714. K. B. 10 *Mod.* 264.

Per Eyre C. J. Fees are not recoverable in the Admiralty Court of London. In the case of *Dorvil v. Olduck*, Shower's Cases Parl. 58. a prohibition was granted by all the judges of England.

11. *DEGRAVE V. HEDGES.* E. T. 1706. K. B. 2 *Lord Raym.* 1285.

There were eight part owners of a ship; six of them proposed sending her on a voyage, to which two would not consent; the six thereon libelled in the Admiralty Court against the others in order to obtain a decree of that Court that the ship should proceed on the voyage; which was decreed accordingly, and that the six should enter into a stipulation to the other two for the safe return of the ship. The ship sailed, and was lost on the voyage; the two sued the other six on this stipulation in the Admiralty. On which the Court of K. B. was moved for a prohibition to stay the proceedings, upon the suggestion of the stat. 13 *Rich.* 2 c. 5. and 15 *Rich.* 2. c. 3. But the Court were of opinion that this point was not fit to be determined on motion; but ordered the plaintiff to take a prohibition and declare on it; and then, on the defendant's demurrer, the point would come judicially before them, and would receive a more solemn determination.* And *Per Holt, C. J.* The Court of Admiralty may take stipulations for bail, and may proceed upon them; and this practice is constantly allowed, though Coke, 4 *Inst.* 135. is of another opinion; and yet such recognizances are as much within the words of stat. 13 and 15 *Rich.* 2. as the stipulation now under discussion. But the question in this case is, whether, by the custom of England, the Admiralty

A stipulation given by several partners of a ship to one who dissents to a voyage, may be proceeded on in the admiralty Court. [275]

* It does not appear that this case ever came again before the Court; and in 1 *Barnard*, 415. Lord Raymond said, that the parties who moved for the prohibition, seeing the opinion of the Court, did not proceed in it.

has not such a jurisdiction; if it has, neither the statute nor common law will restrain them.

12. REID v. DARBY. T. T. 1808. K. B. 10 East, 144.

If the Vice-admiralty Court decrees, or the master orders a ship in foreign parts to be sold, tho' the expense of repairing would exceed the value of the vessel, no property passes to the vendee as neither the Vice-admiralty nor the master possess the power thus assumed.

The Glamorgan, a British ship, having sprung a leak at Tortola, the master applied to the Admiralty Court to order a survey. The Court accordingly ordered an inspection to be made; and the surveyors reported that the vessel was not sea-worthy, or repairable, or capable of being made adequate to carry the cargo to its place of destination, except at an expense beyond the value of the ship itself. Upon this report the Vice-admiralty Court decreed, that the vessel being totally unfit to proceed with her cargo to London, and the repairs being estimated to amount to more than her value, when such repairs should be completed, ordered that the ship should be sold, and the proceeds paid to the master. The vessel was accordingly sold, and, after a further intermediate voyage from Tortola to Nevis, was sent to London. The present suit was then instituted by the owners to recover the ship from the purchasers. Two questions were made: first, whether the sale could be sustained, under the authority of the Vice-admiralty Court; and, secondly, whether it could stand on the authority of the master. The first question was at once determined in the negative; and with respect to the second, *Lord Ellenborough* expressed his inclination to abide by the rule laid down by *Lord Holt*, in *Johnson v. Skipper* (2 Ld. Raym. 984.) that the master has no authority to sell any part of the ship; and that this sale could transfer no property. The sale, however, was determined to be invalid upon another ground, namely, that the forms of the registry acts had not been complied with. *Postea to the Plaintiff.* See *Tremenhere v. Tresillian*, 1 Sid. 453; S. C. 3 Keb: 91; *Hayman v. Molton*, 5 Esp. N. P. C. 65; *Moss v. Charnock*, 2 East. 399; *Heath v. Hubbard*, 4 East. 110; *Hayter v. Jackson*, 8 East. 111; *Bloxam v. Hubbard*, 5 East. 407; *Milles v. Fletcher*, Doug. 230; *Johnson v. Skipper*, 2 Ld. Raym. 984; 2 Inst. 168.

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II. JURISDICTION OF, IN CRIMINAL CASES.* See also tit. Piracy.

1. REX v. COOMBES. Old Bailey, 1785. 1 Leach. C. L. 388; S. C. 1 East. 367.

Where a loaded musket is fired from the coast which kills a man, the offender is properly triable at the Admiralty sessions, because the murder is in law committed when the death occurs.†

This was an indictment at the Admiralty Sessions, against George Coombes, * Before the statute 28 Hen. 8. c. 15. offences being local, and by the common law triable only by a jury of the county in which they were committed, a person who had committed an offence on the high seas could only be prosecuted in the high Court of Admiralty, held before the lord high admiral or his deputy; according to the course of the civil law, and not by a jury; and therefore, according to the maxims of Roman jurisprudence, he could not be convicted, or sentence of death given, without proof by two witnesses or his own confession. See the recital of the stat. 28 H. 8. c. 15; 4 Blac. Com. 208; Com. Dig. Admiralty, E. 5; 2 Hale, 12. 18; 1 Taunt. 29; 2 New Rep. 91; 1 Esp. Rep. 62. But this statute, after reciting these evils, enacts, "that all treasons, felonies, robberies, murders, and confederacies, committed in or upon the sea, or in any other haven, river, creek, or place, where the admiral or admirals have, or pretend to have jurisdiction, shall be inquired, tried, heard, determined, and judged, in such shires and places in the realm, as shall be limited by the king's commission, in like form and condition as if such offence had been committed on land; and that such commissions shall be under the great seal directed to the admiral, and his lieutenant or deputy, and to three or four more (among whom two common law judges are usually appointed,) to be named or appointed by the lord chancellor for the time being, from time to time, and as often as need shall require, to hear and determine such offences after the common course of the laws of this realm, used for treasons, felonies, murders, robberies, and confederacies of the same, done and committed upon the land; and that the commissioners, or four of them, shall have full power to inquire of such offences by grand jury; and that the offender shall afterwards be tried by a petit jury, and that the course of proceeding shall be according to the law of the land. The admiralty commission of oyer and terminer and gaol delivery is directed to three dukes of the royal family; the lord high admiral and his deputy; the commissioners of the admiralty by name, and for the time being; the judge and president of the Admiralty Court; the lord chancellor and commissioners for executing the office of chancellor for the time being; the president of the council; keeper of the privy seal; steward and chamberlain of the house-

† But if a man be wounded upon the high seas, and die upon shore, after the reflux of water, the Admiralty, by virtue of the usual commission, has no cognizance of that felony. 2 Hale. 17—20; 1 East, P. C. 365-6. And it having been considered doubtful whether such an offence could be tried at common law, the stat. 2 Geo. 2. c. 21. provides that the offender may be indicted in the county where the party died. See 1 Hawk. Pl. c. 31. s. 12; 1 Russel, 676.

William Perrot, Jonathan Edwards, Edward Voss, and others, charging William Perrot with having within the jurisdiction of the Admiralty, and about half a mile from the shore, feloniously and wilfully shot one W. A. who had died, in consequence of the wound, on the high seas, within the jurisdiction of the Admiralty; and that Jonathan Edwards, George Coombes, &c. did aid, abet, and assist, the said William Perrot, to kill said W. A. as aforesaid. It appeared, from the evidence, that the prisoners were smugglers; and that W. A. was the master of a ship in his Majesty's service, and that as the master was coming on shore in the king's boat to seize the smugglers' vessels, Perrot and Coombes left their vessel, and fired at the king's boat, as they were pushing her from the sand bank, by which W. A. who was in the boat, was killed about two hundred yards from the shore. Upon this evidence the prisoners were found guilty, subject to the opinion of the judges, whether, under the circumstances, the prisoner had been properly tried by the Admiralty jurisdiction; two of the principal secretaries of state, and treasury of the navy, for the time being; the chancellor and under treasurer of the exchequer, and lord warden of the cinque ports by name, and for the time being; the chief justice of the King's Bench and Common Pleas; one of the privy council; the master of the rolls; the chief baron, and all the rest of the twelve judges; principal of the Arches Court of Canterbury, and master, keeper, or commissary of the Prerogative Court of Canterbury; the advocate general; the attorney general; the solicitor general of the Admiralty for the time being; the secretaries of the Admiralty; the comptroller of the navy and his deputy; the surveyors of the navy; the commissioners of the navy, two other of the privy council; the mayor, aldermen, and recorder of London; the mayors, recorder, and justices of the peace of the cinque ports," and to several other persons particularly enumerated. The commission refers to the statute relative to the admiralty jurisdiction, and directs the commissioners or four of them, of which some of those particularly named must be one from time to time to be appointed to inquire, to hear, and determine all the offences of which the Court of Admiralty has jurisdiction, as well those already committed, as those which at any time after issuing the commission may be committed, and to make gaol delivery. This commission, therefore, being thus prospective as to the commissioners for the time being, and as to future offences, is only issued once in several years. The jurisdiction of the commissioners appointed under this statute was confined to the offences therein enumerated, viz. treasons, felonies, robberies, murders, and confederacies. The statute 39 Geo. 3. c. 37. however, extends the provisions of this early enactment to every offence committed upon the high seas as out of the body of any county of the kingdom. And as persons tried for murder under the first mentioned act could not be found guilty of manslaughter, and therefore when the circumstances reduced the crime to that offence, were acquitted entirely, the 39 Geo. 3. c. 37. enacts, "that where persons tried for murder or manslaughter committed on the high seas, are found guilty of the latter offence only, they shall be subject to the same punishment as if they had committed such manslaughter within the jurisdiction of the ordinary tribunals." The 43 Geo. 3. c. 113. § 2. 3. provides that any person wilfully casting away any vessel, &c. or procuring it to be done, shall be guilty of felony without benefit of clergy; and shall, if the offence were committed on the high seas, be tried, &c. by a special commission as directed by stat. 23 Hen. 8. c. 15.

The stat. 11 & 12 W. 3. c. 7. contains provisions against accessaries to piracies and robberies on the high seas. This special commission is now the only method of trying marine felonies in a court of admiralty the judge of the admiralty still presiding over it. Accessaries before the fact on shore to the wilful destruction of a ship on the high seas, were not triable by the admiralty jurisdiction, under 11 Geo. 1. c. 29. § 7. But now by the stat. 43 Geo. 3. c. 113. which repeals the stat. 4 Geo. 1. c. 12, § 3. and 11 Geo. 1. c. 29. §§ 5. 6. & 7. it is enacted, "that if any person shall wilfully cast away, burn, or otherwise destroy any vessel, or in any wise counsel, procure, or direct the same to be done, and the same shall accordingly be done; with intent to prejudice any owner of the vessel, or of her cargo, or any underwriter on the same, he shall suffer death without clergy; the principal to be tried by the common law court, or in the Admiralty Court, or on the high seas; and that accessaries before the fact, whether the principal felony be committed within the body of a county, or on the high seas, may be tried by the common-law courts, if the principal felony was committed within the body of a county, and by the Admiralty Court if committed on the high seas; but the accessory shall not be tried more than once for the same offence. And see further on this subject 4 Inst. 134—147; 12 Co. Rep. 81; 13 Co. Rep. 54; 2 Roll. Abr. 169; 2 Hale, P. C. 11 to 20; 1 Black. 15; Bac. Ab. Court of Admiralty, D; Com. Dig. Admiralty, E. 1; 4 Bl. Com. 263; and the statutes 23 Hen. 8. c. 15; 32 Geo. 2. c. 25. § 20; 39 Geo. 3. c. 37; 43 Geo. 3. c. 113.

By the stat. 32 Geo. 2. c. 25. § 20. a session of oyer and terminer and gaol delivery for the trial of offences committed upon the high seas within the jurisdiction of the Admiralty of England, must be holden twice at least in every year, viz. in March and October, at the Old Bailey, except when sessions of oyer and terminer and gaol delivery for London and Middlesex are held in the same place; or in such other places in England as the lord high admiral shall, in writing under his hand, directed to the judge of the Court of Admiralty, appoint. In prosecutions upon these provisions the indictment is first found by a grand jury of twelve men, and afterwards tried by another jury, as at common law.

risdiction? or whether he ought not to have been tried by the common law? And the judges unanimously determined that the Admiralty possessed competent authority. See 1 *Hawk. Pl. c. 37. s. 17*; 1 *East. Pl. c. 5. s. 131. p. 367*.

The court of common law have concurrent jurisdiction with the Admiralty to try prisoners for murder in any haven, creek, or river.

2. *REX V. BRUCE*. Old Bailey, 1812. 2 Leach. C. L. 1093; 1 *East. P. C. 368*. The prisoner was tried for murder at the Admiralty sessions. In the course of the investigation it appeared that the crime had been committed in a place which formed part of Milford Haven, and was about seven or eight miles from the mouth of the river or open sea. No evidence was produced to show that common law process was ever executed there. The judge, with suitable observations, left it to the jury to determine whether the offence had been committed within the Admiralty jurisdiction or not, and the jury found the prisoner guilty. The point was afterwards reserved for the opinion of the judges, who determined that the prisoner had been properly tried and that no tenable argument could be urged against the conviction, on the ground of the want of jurisdiction; the place where the offence was committed, being clearly within the 28. Hen. 8. c. 15. and the majority of the judges appeared to be of opinion that the courts of common law had a concurrent jurisdiction with the Admiralty over offences committed in Milford Haven, and in all other havens, creeks, and rivers, in the realm. See 3 *Inst. 111*; 4 *Inst. 134*; 2 *Hawk. P. C. 33. 41*; 2 *East. P. C. 107. 110*; 1 *Russel. 146*; and *id. n. 6*.

8. *REX V. BRISSAC AND SCOTT*. T. T. 1803. K. B. 4 *East. 164*.

The concoction of fabricated vouchers on the high seas, and delivery of them in Middlesex is an offence with in the cognizance of the common law courts.

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Semb.
The manslaughter of an English subject committed in China by an alien enemy who had been a prisoner of war, but at the perpetration a mariner on board an English merchant ship; cannot be tried in England under a commission issued pursuant to the stat. 33 H. 8. c. nally discharged.

This was an information at common law, the 11th count of which charged the defendants with having conspired together at Brassa Sound, (to wit at Westminster,) to fraudulently send and deliver to the commissioners for victualing the navy, a false and fraudulent bill of Exchequer, and a false and fraudulent account, with false and fraudulent certificates, and publish the same as just and true vouchers that S. had bought the quantities of provisions therein mentioned, and at the prices therein specified; whereas, in fact, he had not bought the provisions of the prices and quantities specified. It was proved at the trial, that the scheme was concerted on the high seas; and that all the acts done immediately by the defendant in furtherance of the plot were committed there; but that other innocent persons to whom the vouchers had been transmitted had delivered them to the agents of the government in Middlesex. After the defendants had been found guilty, it was objected, on their appearing to receive judgment, that the offence was only triable under an admiralty commission. *Sed per Cur.* The transmission and delivery of the fictitious documents in Middlesex, though done in pursuance of a preconcerted scheme, planned and organized on the high seas, is sufficient evidence of an overt act in this county to enable the courts of common law to have cognizance of the offence. The fraud owed its origin to the defendants, and its completion to the defendants; the parties receiving the vouchers were mere innocent instruments in their hands. Defendants received sentence.

4. *REX V. DEPARDO*. M. T. 1807. C. P. 1 *Taunt. 26*.

This was an indictment against a Spaniard for murdering W. B. an Englishman, at Canton in China. At the trial the prisoner was found guilty. On its being proved that the deceased was an English mariner, and that the accused had been a prisoner of war, who, upon his being discharged from his imprisonment, enlisted as a volunteer on board a merchant ship at or near the Princess of Wales Island, and received the usual pay; that the vessel in which the prisoner was on board had sailed to Canton, and that the murder had been perpetrated on shore; that the deceased, upon receiving the wound, was removed to the vessel to which he belonged, and which was then lying in the Canton river, about 80 miles from the sea, where he died on the following day. The judgment was respited, in order to obtain the opinion of the judges whether a trial under a special commission issued by virtue of the 33 Hen. 8. c. 27. and 43 Geo. 3. c. 113. § 6. was sustainable. The case was elaborately argued, but no judgment was given, and the prisoner was finally discharged.

5. **REX v. EASTERBY AND MACFARLANE.** 1802. 2 Leach. C. L. 947; 1 East. P. C. Addend. 24.

This was an indictment on the 11 G. 1. c. 29. §§ 6. 7. against the master of a ship at the Admiralty sessions for wilfully destroying her on the high seas; and against two persons, the owners, for procuring her destruction, with intent to defraud the underwriters. The master was convicted and executed. But as the evidence against the owners only showed that they had given orders when on shore to the master to effect their criminal purpose, it was objected on their behalf, that they had committed no offence within the jurisdiction of the Admiralty; and that they were, therefore, entitled to be acquitted. The jury having found them guilty, the point was submitted to the consideration of the judges, who were of opinion, that whether the act in question (11 Geo. 1. c. 29.) were considered as making the persons who directed or procured the destroying of a ship, principals or accessaries; yet inasmuch as no act was done by the owners within the jurisdiction of the Admiralty, they were not subject to that jurisdiction, and that consequently the trial had been improper. *But see the 43 Geo. 3. 113. which repeals 11 Geo. 1. c. 29. §§ 5. 6. and enacts that accessaries before the fact, whether the principal felony be committed within the body of the county, or on the high seas, may be tried by the common law courts if the principal felony was committed within the body of the county, and by the Admiralty Court if committed on the high seas.*

23: 43
Geo. 3. c.
113. § 6.
Under the
11 Geo. 1.
c. 29. § 7.
a person
who is ac-
cessary on
land to a
felonious
shipwreck
is not tria-
ble by the
admiralty
jurisdiction.

III. MODE OF PROCEEDING, AND PLEADINGS IN.

1. **SPARKS v. MARTYN.** M. T. 1667. K. B. 1 Vent. 1.

On a motion for a prohibition to the Admiralty, it appeared that a party had been libelled for rescuing a ship, and taking away the sails attached to it, from a person executing the process of the court; and that he had, in the presence of the judge, committed an assault, and uttered many opprobrious epithets; it was urged in support of the prohibition, that these matters were determinable at law, the ship being *infra corpus comitatus*; that the Admiralty Court could not award damages to the party, or fine or imprison him.

Per Cur. We cannot grant the motion; for the Admiralty may punish any one who resists the process of their court, and may fine and imprison for a contempt; but if they should proceed to give damages, this Court would grant a prohibition *quoad* that part of the sentence.

The Admi-
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cess, and
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but cannot
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party ag-
grieved
damages.

2. **BETTS v. HANCOCK.** E. T. 1700. K. B. 1 Salk. 34.

In the Admiralty, the principal died before sentence. Notwithstanding this circumstance, that Court proceeded against the bail upon the stipulation, *an instrument* in the nature of a recognizance, by which he bound himself not pro and his heirs. A motion was made for a prohibition. It was insisted that the Court could not take notice of the proceedings or law of the Admiralty, unless pleaded; and the particular reason why the temporal courts took cognizance of the spiritual law was, that both the spiritual and temporal laws were originally administered in the same court, and consequently that argument did not apply to the present case. That if the defendant had been in gaol, and had died within the walls of the prison, the suit must have abated; and there was no reason why the suitor would be in a better condition by the defendant's being in custody of his bail, than in case he had been in actual confinement; and that the security given was only conditioned that the defendant should abide the judgment of the Court. On the other side it was said the bail in the Admiralty are sued as principals; and that that was the ordinary practice of this court, because the plaintiff and defendant, being seafaring men, are more than others subject to casualties. The matter was adjourned, and afterwards compromised. *See Raym. 78.*

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Semb. The
Admiralty
Court, can-
not pro-
ceed after
the death
of the prin-
cipal be-
fore sen-
tence, against
the sureties on
a stipula-
tion.

3. **SANDYS v. THE EAST INDIA COMPANY.** H. T. 1682. K. B. Skin. 93.

Per Saunders, C. J. A person may be taken under an execution out of the county in which he is taken, upon it in any county in Eng.
* The stat. 20 H. 8. merely altered the mode of trial in the Admiralty Court; and its jurisdiction still continues to rest on the same foundation as it did before that act. *Per Mansfield, C. J. 1 Taunt. 29.*

On an exe-
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the Admi-
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party may
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in Eng.

land.* the Admiralty, upon sentence there, in any county of England. *See* 1 *Com. Dig. Admiralty*, E. 22.

4. ANONYMOUS. E. T. 1676. K. B. Vent. 308.

It must be averred on the libel that the act was done *super altum mare*. Libel for a ship taken by pirates and sold at Tunis; but no averment was introduced that the ship was taken *super altum mare*; and though it contained sufficient to raise the implication, yet the Court held an allegation to that effect absolutely necessary to support their jurisdiction.

5. BRAKE V. TYRPEL. E. T. 1688. Holt. Rep. 47; S. C. 1 Show. 6; Comb. 120; Carth. 31; 3 Mod. 194; Bro. Ent. 69.

Trespass for taking a ship, &c. The defendant pleaded that he was captain of a man of war; and that he took her on the high seas as a prize, and carried her to ———, and there prosecuted her, and condemned her in the Admiralty as a prize, &c. Demurrer, *Holt, C. J.* Stating that he was captain is well enough; he need not show his commission. But it does not appear how this ship came to be a prize, or that there was any cause to seize her as such; nor is it shown that there was any war. The subsequent application to the Admiralty cannot justify the first illegal caption. Besides, it is not shown whose Court of Admiralty it was, nor before what judge.

[281] Judgment for the plaintiff by the whole Court. *See Bul. N. P.* 245; 2 *T. R.* 647; 4 *T. R.* 382; 1 *H. Bl.* 476.

RUTHERFORD V. SCOTT. T. T. 1737. K. B. 2. Stra. 936.

The defendant being brought up by *habeas corpus* from the Admiralty, it appeared that he had been charged there, at the suit of several owners, with embezzling the goods of a ship; and the plaintiff here making an affidavit that he was indebted to him on a promissory note, the Court had him removed from the Admiralty, and delivered into the custody of the marshal, observing that the cause in the Admiralty might as well be followed in an action of trover, and they paid no regard to the Admiralty method of sending over a commission to examine foreign witnesses, which was a privilege, it was urged, that the plaintiffs below could not have in the King's Bench.

The warrant for arrest of a ship by the admiralty, & the process of citation, is notice to all the world of the subsequent proceedings.

7. ATTORNEY GENERAL V. NORSTEDT. T. T. 1816. Exch. 3 Price. 109. In this case it was submitted in argument, and assented to by the Court, that a warrant of the Instance Court† for the arrest of a ship containing an order for the general citation of all persons interested to come forward with their claims, is *per se* notice to all the world of the subsequent proceedings.

IV. EFFECT OF A SENTENCE IN AN ENGLISH OR FOREIGN COURT.—*See also tit. Prize.*

1. JURADO V. GREGORY. T. T. 1668. K. B. 1 Lev. 267; S. C. 1 Vent. 32; 2 Sid. 418. S. P. HUGHES V. CORNELIUS M. T. 1681. K. B. 2. Show. 232; S. C. Ld. Raym. 473; S. C. Skin. 59.

A prohibition was moved for the Admiralty on a suggestion that the contract was made on land, at M. in Spain; but it was answered, that though the contract was made on shore, yet there being in this case a sentence and a suit in the Admiralty in Spain, and the suit here being instituted for no other purpose than to execute that sentence, the prohibition ought not to be granted. (*See* 1 *Rol. Ab. Admiralty Courts.*) The Court inclined to this opinion; but then it was urged that the sentence abroad was not peremptory and final, but only interlocutory, that he should receive and carry the goods according to the agreement, and on which an action at law for damages might be supported. Whereupon it was ruled, that the plaintiff should declare on the suggestion, so that on the pleadings the matter might come judicially in question. *See* 2 *Keb.* 511; 1 *Sid.* 418; 2 *Show.* 338; *Raym.* 473; 2 *Jones*, 66; 6 *Mod.* 70; 1 *Vent.* 1; *Hob.* 12.

* Executions in the Admiralty may be against the person of the defendant, and that court may appoint the prison in which he is to be confined. *Sav.* 12. but execution cannot issue from thence against the defendant's lands; *Per Cook. Godb.* 261. If a person taken in execution upon a sentence of the Admiralty bring a *habeas corpus*, he shall not be discharged, if the cause do not appear out of their jurisdiction, though irregular, for he ought to have made an appeal. *Sto.* 129.

† *See* Lord Mansfield's judgment in *Lindo v. Rodney*, 2 *Dou.* 613.

2. **THE KING v. BROOM.** T. T. 1696. K. B. Holt. 647; 12 Mod. 13; S. C. 1 Salk. 32; S. C. Carth. 398; Comb. 444; S. C. 5 Mod. 340.

The defendant, by letters of mark, &c. from the African Company, took a French ship in the river of Besau, near Gambore, which he carried to Africa, and the Admiralty there condemned it as the king's prize. After this Broom sold the ship at land, and applied the money to his own use, and came to England, and was sued in the Admiralty Court here for an account. After sentence against him he appealed, and then moved for a prohibition, but it was not obtained; for the suit here is but an execution of the first sentence, by which the ship is adjudged the king's prize. Now the Admiralty having a jurisdiction, that sentence has bound the property, and we cannot examine the property, but must take it according to their determination, which cannot be impugned till it be repealed on appeal. Rule for a prohibition discharged. See 1 Cro. 69; Winch. 8; Sav. 253; 2 Roll. Ab. 319; 12 Co. 77; 1 Sid. 320; 2 Saund. 259; Palm. 96. *Le Caux v. Eden*, Doug. 594; *Candor v. Hane*, 4 T. R. 382; 1 Show. 29; 2 Salk. 440; 6 Mod. 13; 3 Lev. 351; 4 Mod. 176; 3 T. R. 323; Doug. 594.

- BURTON v. FITZGERALD.** T. T. 1736. K. B. N. P. 2 Stra. 1078.

In an action on a charter party to sail to Calais, the defendant pleaded that the ship was unfit for the voyage, being rotten, and therefore not capable of being loaded at Calais. Upon issue being joined on this allegation, several witnesses were examined, and the defendant offered to give in evidence proceedings in the Admiralty Court at Calais, under which commissioners had been appointed to survey the ship, and on whose report a sentence of condemnation had been pronounced. But it was contended that this being a contract under seal, and entered into on land, the Admiralty had no jurisdiction, and that the sentence was consequently void. *Lee C. J.* adopting this opinion, refused to admit it in evidence, observing, that this being a contract under seal made on land, the Court of Admiralty had no jurisdiction.

4. **LADBROKE v. CRICKET.** M. T. 1788. K. B. 2 T. R. 653.

Even after sentence, if it can be shown that the Admiralty had no jurisdiction over the subject matter, the whole is *coram non judice*. *Per Lord Kenyon*.

5. **MENETONE v. GIBBONS.** E. T. 1789. K. B. 3 T. R. 269.

It was argued in this case, that if there be a defect of original jurisdiction, the sentence of the Admiralty is a nullity. The Court concurred in this opinion; and *Lord Kenyon, C. J.* observed, that if the defendant's counsel were right in saying that the Admiralty had no jurisdiction originally, they might take advantage of it at any time, since the sentence in such a case would be a nullity.

V. WHEN AND HOW RESTRAINED FROM PROCEEDING WHEN IT EXCEEDS ITS JURISDICTION.

1. **TURNER v. CARY AND NEELE.** T. T. 1667. K. B. 1 Lev. 243; S. C. 1 Sid. 367.

Upon an application for a prohibition, it appeared that a man who had letters of mark, during a war with the Dutch, seized an Ostend instead of a Dutch ship, and brought her into harbour, where on being libelled she was declared to be no prize, and a sentence to that effect pronounced. The owner of the Ostend vessel proceeded in the Admiralty against the captor for damages sustained by the seizure and detention. A prohibition was moved for, on the ground that this suit was for the recovery of damages for an injury done in port, and for which an action lies at common law; but the application was refused, because the original act being a caption at sea, and the bringing into

* For the numerous cases connected with the admissibility in evidence of sentences in the foreign and English courts of Admiralty, see post tit. Prize: and from which it may be clearly deduced that the sentence of a court of Admiralty is conclusive against all the world in all civil suits, as to all matters within its jurisdiction, and decided by the sentence unless regularly reversed on appeal. See *Thompson v. Smith*, 1 Sid. 330; *Brown v. Franklyn*, Carth. 479; *Le Caux v. Eden*, 2 Doug. 600; *Hughes v. Cornelius*, 2 Show. 232; S. C. *Ld. Raym.* 373; *Latham v. Henderson*, 3 B. & P. 513; *Bolton v. Gladstone*, 5 East, 160; *Christie v. Secreton*, 8 T. R. 196; *Baring v. Clogett*, 3 B. & P. 214; *Fishe v. Ogle*, 1 Campb. 418; *Everth v. Hannam*, 2 Marsh. 92.

Or if a foreign Admiralty judge a ship to be prize, and after sale here upon land there be a suit for an account, a prohibition shall not go, for it is only an execution of the sentence which adjudged it to be a prize.

Sentence of a foreign Admiralty condemning a ship as unfit, not admissible in evidence in action on a charter party. *Qu.* [283]

If the Admiralty has no jurisdiction over the subject matter, the whole is *coram non judice*. And the sentence being a nullity, is at anytime impugnable.

If the original cause arise within the Admiralty jurisdiction, the consequence thereof shall be determined in the same court.

port, in order to have it condemned as prize, but a consequence thereof, not only the original wrong, but also the attendant results, shall be tried there. *See* *Ld. Raym.* 473; 6 *Mod.* 11. 79.; 2 *Keb.* 360; *Roll. Ab.* 530; 3 *Cro.* 685; 1 *Salk.* 35; 1 *Vent.* 32; 2 *Show.* 338.

2. *RIDLEY V. EGGLEFIELD.* M. T. 1670. K. B. 2 *Saund.* 259. a.; S. C. 2 *Lev.* 25. S. P. EDMONSON V. WALKER. M. T. 1690. 1 *Show.* 177; S. C. *Carth.* 166; *Holt.* 650.

So shall incidental or collateral matter.

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If the libel be stated to be for flotsam, when it is really for a wreck, a prohibition may be obtained.

A prohibition should not in general be granted upon process out of the Admiralty upon an affidavit that it is for a cause of action upon land, but a libel should be first exhibited.

But where the Admiralty had granted a warrant according to the course of their Court to seize a ship and before libel was exhibited, a prohibition was moved for and granted.

In action on the case for suing in the Admiralty, contrary to the statutes of Richard II. and Henry IV. the plaintiff declared that he had been libelled there for a ship and goods, and upon the supposition that they had been taken by pirates upon the high seas, and to have come afterwards to the defendant's hands upon the high seas, whereas he had purchased them upon land. Upon not guilty pleaded, it appeared that the goods were contraband, intended to be conveyed to the Dutch, during the war between the English and that state, and taken by a Scotch man of war, and at the suit of the now defendant condemned as prize by the Admiralty of Scotland, and sold to one B. who brought them to land, and sold them to the plaintiff in England. The judge before whom the cause was tried entertaining some doubts upon the subject, a juror was withdrawn, and a trial at bar directed. *Per Cur.* This case is not within the statute, for the original cause, the taking and robbing on the sea, belongs to the Admiralty; and upon this all the rest depends. The property of the plaintiff cannot be determined, unless the taking be determined, which is proper for the Admiralty to decide. Neither the condemnation in Scotland or the sale at land effects the jurisdiction, the original matter being piracy, all which comes in question collaterally, is only matter consequential, and dependent upon the piracy. *See* *Cro. Eliz.* 685; 3 *Mod.* 194; 1 *Vent.* 173; 2 *Keb.* 828; 1 *Danv.* 269; *Raym.* 473; 1 *Roll. Ab.* 530; 1 *Sid.* 320; *Godb.* 26; *Hob.* 78; 1 *Vent.* 32; *Molloy.* 449.

3. *THE LADY WINDHAM'S CASE.* H. T. 1676. C. P. 2 *Mod* 294.

Per Cur. If flotsam come to land, and is taken by him who has no title, the action shall be brought at common law, and no proceedings shall be had thereon in the Court of Admiralty, for there is no need of condemnation thereof, as there is of prizes. *See* 4 *Inst.* 134. 154; 1 *Roll. Ab.* 531. 640; *id.* 529; 3 *Buls.* 148.

4. *TRANter V. WATSON.* M. T. 1702. K. B. 6. *Mod.* 11; S. C. 2. *Ld. Raym.* 931.

A process had been awarded by the Admiralty, at the suit of the master of a ship against the owners, to arrest the cargo at Bristol, on account of salvage; and now before appearance a motion was made to this court for a prohibition, on affidavits of the matter before any libel had been exhibited, whereby it appeared the goods landed were arrested on account of salvage; and Sands's case was cited, where, on a process to stay a ship in the river, a prohibition was granted before appearance. *Per Cur.* Though the goods be now detained at land, yet the salvage, which was the cause of that arrest, might be at sea, which will appear by the libel; we will not, therefore, grant a prohibition before appearance or libel to try the validity of the process, because the party may have another remedy by action of trespass or replevin; and this is not similar to Sand's case (1 *Lev.* 351.) for there the process was not for an appearance, as this is, but in the nature of an execution. *See* *Skin.* 92. 93.

5. *POWEL V. ROBINSON.* T. T. 1716 *Ex. Bunb.* 9.

The Admiralty granted a warrant, according to the course of their Court, to seize a ship; and before a libel was exhibited, a prohibition was moved for, which was alleged to be premature, the warrant being only in nature of process to bring the party into court; and that it did not yet appear that the Admiralty had no jurisdiction, but it being insisted upon on the other side that it was the constant practice not to exhibit any libel on such a warrant, but to proceed only on the warrant, and precedents being cited of prohibitions granted in like cases, a prohibition was awarded. *Per Lord Chief Baron Bury and Price, contra Montague.*

6. MINNETT v. ROBINSON. M. T. 1722. Ezch. Bunb. 122.

Libel in the Court of Admiralty for wages. Prohibition was moved for in the Exchequer, on the ground that the ship had been seized for smuggling. The owner had compounded, on submission to a fine, &c. and it was argued that this amounted to a condemnation, and avoided all prior incumbrances; but the Court held otherwise, and refused a prohibition. *See the Attorney-General v. Norstedt*, 3 Price, 97.

7. BROWNE v. WALKER. M. T. 1683. K. B. 2 Show. 406.

A prohibition was applied for the plaintiff in the Court of Admiralty, who had there libelled the defendant. The suggestion alleged that the suit (which was the applicant's own) was on letters patent of the king, and that the construction whereof belonged to the common law judges, and that they had been entered into on land, &c. *Per Cur.* We cannot grant the prohibition as prayed. The plaintiff, after having commenced the suit himself in the Admiralty, now, when he finds the Court inclined against him, requires a prohibition to stay his own proceedings, and deprive the defendant of all his costs. *See Worts v. Clyston*, Cro. Jac. 350; *Stratford*, 576; 2 Inst. 602; 2 T. R. 473; 1 Show. 173; 2 Burr. 813; 2 Roll. Ab. 312; 3 Mod. 286; 1 T. R. 552; Cro. Eliz. 55; 6 Com. Dig. Prohibition, E.

8. ANON. M. T. 1697. K. B. 12 Mod. 243. S. P. ANON. H. T. 1702. K. B. 2 Salk. 553.

Holt, C. J. denied a prohibition to the Admiralty for refusing to give a copy of the libel; because stat. 2 Hen. 5. c. 3. extends only to the Ecclesiastical Court, and not to the Admiralty. *See Com. Dig. Prohibition, F. 15.*

9. ANONYMOUS. M. T. 1723. K. B. 8 Mod. 194. S. P. SHERMOULIN v. SANDS.

M. T. 1698. K. B. 1 Ld. Raym. 272. *BUGGIN v. BENNETT*. E. T. 1767.

K. B. 4 Burr. 2034. *Per Buller, J.* in *LADBROKE v. CRICKETT*. M. T. 1788. 2 T. R. 654.

On a motion for a prohibition to the Admiralty Court, an affidavit was produced, stating, that the cause of action did not arise on the high sea. But it was denied *per Cur.* For when the sentence is passed no prohibition ought to be granted, unless it be for some cause apparent on the face of the record. *See 1 Com. Dig. Admiralty, F. 2; 6 Com. Dig. Prohibition, D; Str. 729.*

10. CATON v. BURTON. T. T. 1775. K. B. Cowp. 330. ROBERTS v. CARD. H. T. 1727. Bunb. 247.

On showing cause against a rule, which had been obtained for that purpose why a prohibition should not go to the Admiralty Court, in a suit for an assault upon the high seas upon a suggestion that the cause of action arose, if at all, in the body of a county, viz. at Dover, in the county of Kent, and not on the high seas. Upon the authority of a case in Moore, 891. which was a libel in nature of an action of detainee at common law; for a ship lying at anchor at Limehouse *infra corpus comitat.*; a prohibition was granted. It was insisted that, as the defendant had pleaded to the merits in the Admiralty Court, a prohibition ought not to go, because the want of jurisdiction alleged by the suggestion did not appear upon the face of the libel; *Jennings v. Audley*, 2 Brownl. 30; and that there ought to have been an affidavit, verifying the truth of the suggestion. *Acton, J.* In *Theyer v. Eastwick*, Hil. 7 G. 3. the Court held, an affidavit of an alleged custom necessary. There are also the cases of *Hynes v. Thompson*, Mich. 1738. 12 Geo. 2. in B. R. and *Buggin v. Bennett* Preb. 7 Geo. 3 B. R. in which latter case the three former were alluded to, and relied on, by the Court in their judgment. And *Per Lord Mansfield C. J.* The reason in these cases are decisive, namely, that the party shall not stop the proceedings of a court of justice upon a mere suggestion without an affidavit.—Prohibition denied.

11. WHARTON v. PITS. T. T. 1692. K. B. 2 Salk. 548.

A suit was instituted in the Admiralty against the master and ship, the latter lying in the Thames, for heedlessly running over another vessel; and the defendant there moved for a prohibition. The plaintiff informed the Court that the defendant would not appear, so that he could have no remedy at law; upon which the Court refused a prohibition, unless the defendant would un-

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Prohibition to the Admiralty Court denied where there was a libel for mariners' wages after seizure of the ship for smuggling.

A prohibition will not be granted to the Admiralty court on the application of the plaintiff in that court.

Prohibition does not lie to the Admiralty court for refusing the copy of a libel.

A prohibition will not lie after sentence, except for cause appearing on the face of the proceedings;

[286] Nor before sentence where the matter of suggestion is dehors the proceedings, and not verified by affidavit.

A prohibition could not formerly be obtained for a cause actionable at common law, unless the defendant appeared & gave bail. *Semb. over ruled. Vide infra.*

dertake to appear and give bail. *See Velthasen v. Ormsley*, 3 T. R. 315.

12. VELTHASEN v. ORMSLEY. T. T. 1789. K. B. 3 T. R. 315.

But now it will be granted without imposing any terms on the applicant. On a motion for a prohibition to the Admiralty Court, for running foul of a vessel, the suggestion stated that percussing had happened on the river Thames. It was admitted, however, that the Admiralty had no jurisdiction; but the defendant prayed that the Court would not grant the prohibitory process till the plaintiff put in bail to an action which had commenced against him, in a court of common law, and to which he had not yet appeared. Especially it was argued, as the plaintiff was an alien, and the ship a foreign vessel, and as both were abroad, the only security the defendant had, to answer the damage he had sustained, was the bail given to him in the Court of Admiralty. *Per Cur.* The case of Wharton v. Pitts, *supra*, is not of itself a sufficient authority to warrant us in imposing the terms prayed.—*Rule discharged. See Voilet v. Blague*, Cro. Jac. 514.

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13. BUGGIN v. BENNEYT. E. T. 1776. K. B. 4 Burr. 2035.

The words "covenanted and agreed" are not sufficient to show that the contract was under seal to obtain a prohibition after verdict. A prohibition was moved for to suspend the effect for seamen's wages in the Admiralty. The ship was destroyed, and the master had covenanted and agreed to allow the seamen their wages, in consideration of their helping to save the cargo. This covenant was not stated below to have been under seal, but that fact was now suggested as ground for the prohibition. The Court held, that the plaintiff had lost the opportunity, by not taking the objection below, or coming for a prohibition before sentence, and with an affidavit of the truth of the suggestion.

VI. OF THE REMEDY FOR SUING IN THE ADMIRALTY COURT OUT OF ITS JURISDICTION.*

1. SANDS v. CHILD. E. T. 1692. K. B. 4 Mod. 176; S. C. 1 Salk. 31; S. C. 3 Lev. 351; Comb. 215; S. C. Skin. 334; S. C. Carth. 294

An action lies upon the statute 15 R. 2. for improperly issuing process out of the admiralty. The plaintiff in his declaration, after reciting the statutes 13 R. 2. 15 R. 2. and 2 Hen. c. 11. alleged that he was owner of a ship lying in the Thames, within the body of the county, laden with divers goods, wherein he had a fifth part to his own share; that the ship was ready to sail, and that the defendant caused a proceeding to be laid in the Admiralty against the ship, and the ship to be arrested and staid until he gave security not to go to the Madeiras or to the East Indies, whereby he was detained three months, and lost his voyage, to his damage of 3000*l*. On not guilty pleaded, the jury found specially that the East India Company, by charter, had the sole trade to the East Indies and Madeiras, and that the plaintiff was going thither; and Sir Joseph Child, one of the defendants, was governor of the company, and procured an order of council to the king's advocate-general to proceed in the manner stated in the pleadings. The damages were assessed at 1500*l*. and 5*l*. costs, which were doubled according to the statute. Judgment was given for the plaintiff in the Common Pleas; and a writ of error was afterwards brought in the King's Bench, when it was resolved, 1st, That though there was but one act, and but one offence, yet every person injured might have an action and recover damages, and on every conviction the defendant would forfeit 10*l*. to the king. 2dly, Though there be a process and no suit, nor no plaintiff and defendant, yet this is a prosecution within the meaning of the statute, for it is in the usual way of proceeding there, and of the same mischief. 3dly, That Child was a prosecutor within the statute, though no suit was in his name, because he promoted and maintained it; and if he did it of his own head, then it is properly his own action; if as agent to the company, and by their command, then that command being to do an unlawful act must be void; but they held a mere attorney would not be a prosecutor within the statute. 4thly, That all the five proprietors, being joint owners, should have joined in this action; but this not being not pleaded in abatement, as it should have been, all is now well, for though it appears by the statute that The Admiralty and his deputy shall not hold pleas of things done within the realm, but on sea only. 13 R. 2. 15. And parties grieved by suits in the Admiralty Court, under 13 R. 2. c. 5. shall recover double damages by action on the case against such pursuer, who if attainted, shall also incur the penalty of 10*l*. to the king for his suit so made. 2 H. 4. c. 11.

declaration that there were four others, joint tenants of these goods with the plaintiff, yet it does not appear that they are dead, and then Sands alone is entitled to the action; and whenever joint tenancy is pleaded in abatement, the list of the other joint tenants not named is averred in the plea, otherwise the plea is illegal. See *Bendl. 57. pl. 92; Roll. Rep. 205; Judgment affirmed, Noy. 62. 158; 2 Lev. 8; Dyer, 351. b; 1 Saund. 29; 3 Lev. 351; 1 Mod. 18; 6 Mod. 13; Carth. 249; Com. 215; Bro. Ent 435; Holt, 744.*

2. *BENSON v. JEFFRIES.* H. T. 1695. K. B. 1 *Ld. Raym.* 152.

Per Holt, C. J. "An action was brought upon the stat. 2 Hen. 4. c. 11. An action for suing in the admiralty upon a hypothecation, and it was held to be out of the statute in the time of Lord Hale. [288]

Admission. See tit. Answer in Chancery; Attorney; Bankrupt; Baron and Feme; Confession; Corporation; Deed; Evidence; Grant; Partner; Principal and Agent; Recital; Witness. c. 11. for suing in the Admiralty upon an hypothecation.

Admission and Institution. See tit. Advowson; Church; Presentation.

Admittance to Copyhold. See tit. Copyhold.

Admonition. See tit. Ecclesiastical Courts.

Ad quod Damnum. See tit. Grant; Fair; Highway; Market; and on this subject in general see *F. B. N. 221-5 to 224. 1 Com. Dig. 517; 5th ed.; 1 Burr. 465; 1 Saund. 175. n. 2; 3 Atk. 766; 2 Vin. Ab. 125; 2 Burn. Just. 669.*

Adultery, Action for. See tit. Baron and Feme; Dower.

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(A) FOR PLAINTIFF, p. 294.

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I. IN WHAT CASES, AN ACTION IS, OR IS NOT MAINTAINABLE. [289]

1. *RIGAUT v. GALLISARD,* M. T. 1700, K. B. 7 *Mod.* 81; *S. C.* 2 *Salk.* 552; 2 *Ld. Raym.* 809; *Holt*, 597.

Per Holt, C. J. If adultery be committed with another man's wife, without any force, but by her consent, though the husband may have an action of assault and battery, and lay it *vi et armis*, yet they shall in that case punish in the Ecclesiastical Court, for the offence; for an indictment is not in such cases sustainable; neither can the husband and wife join in the action at common law, and therefore they proceed either below civilly, that is, to divorce them, or criminally, because they were not criminally punishable here; and the proper remedy for the husband in such case is a special action, *quia* the defendant has seduced his wife *rapuit*; and not to lay it *per quod consortium amisit*. See 1 *Roll. Ab.* 295; 2 *Inst.* 488; 3 *P. Wms.* 269; *Stra.* 61; *Ld. Ray.* 1.

2. *SMITH v. ALLISON.* T. T. 1764. K. B. *Bul. N. P.* 27. *S. P. HODGES v. WINDHAM,* H. T. 1791, K. B. *Peake, N. P. C.* 53.

In this case it was laid down by Lord Mansfield as clear law, that if a wo-

* In the year 1604, a bill was brought into parliament "for the better repressing the detestable crime of adultery," which was afterwards abandoned on its being suggested that it was introduced rather with a view of accomplishing private purposes than for the public welfare. But during the time of the Commonwealth it was enacted, that adultery should be adjudged felony, and every person, as well the man as the woman, offending therein, should suffer death without benefit of clergy. These rigorous enactments, however, ceased at the restoration, and adultery, as far as respects the temporal courts, is considered merely as a civil injury.

† Where adultery has been committed by the wife, but pardoned by the husband, it does not preclude him from suing for a separation in the Ecclesiastical Court. *Dunn v. Dunn*, 3 *Phil. Rep.* 6, overruling the same case in 2 *Phil. Rep.* 403, but where the adultery of the wife has been acquiesced in by the husband, coupled with circumstances of misconduct on his part, the Court will not decree a divorce. *Best v. Best*, 1 *Addams.* 436.

man be suffered by her husband to live as a prostitute, and a man be thereby drawn into crim. con. no action will lie at the suit of the husband, for it is a damage without an injury; but if the wife lives in such a state of prostitution without the privity of the husband, it will not bar the action, be she ever so profligate, but only go in mitigation of damages. Pratt, C. J. declared himself of this opinion about the same time. See 2 Inst. 435, 436; Co.

Aliter, if the husband is not privy to her misconduct. Lit. 32. a. n. 10; F. N. B. 89. O.

3. HOWARD v. BARTONWOOD, *Sittings after T. T.* 1742, C. P. cited 1 Selw. N. P. 10. 12. 5th ed. S. P. *Supra* per Lord Mansfield.

Per De Grey, C. J. If the wife is a prostitute, and the husband be not privy to it, it goes only in mitigation of damages. And *Vide supra*. 2.

4. DUBERLY v. GUNNING, E. T. 1792. K. B. 4 T. R. 657. S. P. WORSLEY v. BISSET. Esp. N. P. Dig. 363; and FOLEY v. PETERBOROUGH, cited BENNET v. ALLCOTT, 2 T. R. 166. HOWARD v. BARTONWOOD. T. T. 1776. C. P. cited 1 Selw. N. P. 10; S. C. not S. P. 1 Esp. N. P. Dig. 362.

Per Buller, J. The law on this subject is now clearly settled to be, that if the husband consents to his wife's adultery, it goes in bar of his action; if he be only guilty of negligence, or even loose or improper conduct, not amounting to consent, it only goes in reduction of damages.

5. CIBBER v. SLOPER, *Sittings after M. T.* 1738, 1 Selw. N. P. 11. S. C. Bul. N. P. 27; cited per Lord Kenyon, in DUBERLY v. GUNNING, E. T. 1782, 4 T. R. 655.

This was an action of adultery cited before Lee, C. J. in which it was proved that the plaintiff and defendant lived in the same house, that their bed-

chambers were adjoining to each other, and that there was a communication between them by a door. Mrs. Cibber used to undress herself in her husband's room, and leave her clothes there, and, putting on her bedgown retired to Mr. Sloper's room with one of the pillows taken from her husband's bed, Mr. Cibber shutting the door after her, and wishing her good night. It was proved also that Mr. Cibber sometimes called Mr. Sloper and Mrs. Cibber up to breakfast. The plaintiff obtained a verdict with 10*l.* damages. The husband to the adulterous intercourse be clearly proved.*

6. COOL v. BERTY, M. T. 1697, K. B. 12 Mod. 232.

In dower, the defendant pleaded elopement in the wife; the wife replied that her husband had bargained and sold her to the adulterer, and held bad; and licence by husband and wife to lie with another man cannot be pleaded in bar to an action of trespass by the husband, nor that she was a notorious lewd woman, but these matters may be given in mitigation of damages. *Per Cur.*

7. WYNDHAM v. LORD WYCOMBE, 1801, N. P. 14. Esp. 16. S. P. STRUTT v. MARQUESS OF BLANDFORD. Id.

This was an action of adultery. On the part of the defendant it was shown that, during the plaintiff's residence at Florence, he had in an open, notorious, and undisguised manner, carried on a criminal correspondence with other women. On this evidence Lord Kenyon ruled, that if a married man neglects the society of his wife, and lives openly with other women in adultery, he is incapacitated from maintaining any action for criminal conversation with his avowed wife.

criminal connexion with other women after marriage will furnish a bar to the action.

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8. BROMLEY v. WALLEY, 1802, 4 Esp. 237.

In this case general evidence was given of the infidelity of the husband; and that he had in particular misconducted himself with the maid-servant of

* Lord Kenyon in *Duberly v. Gunning*, characterized the above as a leading case upon the subject; observing that if such a man (Cibber) could have recovered a verdict, the very source and first principle of justice would have been contaminated. A distinction with a view of reconciling the contradictory decision in *Smith v. Allmon*, and *Cibber v. Sloper*, has been attempted to be advanced between the husband's consent to the wife's living in a state of indiscriminate prostitution, and tolerating a criminal connexion with one individual. Esp. N. P. 364. This difference, however, does not appear to be sanctioned by authority, nor could it be easily sustained by general reasoning.

his family, and had during his indiscriminate amours, contracted the venereal disease. But Lord Alvanley refused to nonsuit the plaintiff, as he dissented from Lord Kenyon's doctrine upon that subject, and thought the infidelity or misconduct of the husband could never be set up as a legal defence to the adultery of the wife; it went only in mitigation of damages. That alone which struck him as furnishing any defence, was where the husband was accessory to his own dishonour.

9. *WEEDON v. TIMBRELL*, T. T. 1793, K. B. 5 T. R. 357; S. C. 1 Esp. 16; S. P. *BARTELOT v. HAWKER*, T. T. 1790, N. P. Peake, N. P. C. 7.

In an action for criminal conversation it appeared that the plaintiff and his wife had agreed to live separately. Several acts of adultery were proved to have been committed by the defendant subsequent to the separation, but there was no direct proof of any act of adultery prior to that time. The plaintiff was non-suited; and upon a motion for a new trial, it was said *Per Cur.* It is material to consider what is the gist of the present action. The plaintiff contends that it is the criminal act; but that we deny. It is a civil action brought to recover a pecuniary compensation for a civil injury, and not to punish the defendant for having violated the laws of morality, and infringed the rules of decency. What injury can the plaintiff sustain after he himself has voluntarily relinquished his wife? It cannot be said that he is deprived of her comfort and society. We admit the immorality of the defendant's conduct; but still actions of this description must be confined within legal limits, this is analogous to the case of an action by a father for the loss of service of his child; but it is clear that an action cannot be maintained unless evidence be given that the daughter has performed some acts of service for her parent. This is not like the instance of a temporary separation from the wife, by the husband's residing in a different country; in such case, the wife still impliedly continues under the protection of her husband; but here any such inference is repelled by the positive act of the parties. Rule discharged. See 3 Wils. 319; Peake, N. P. c. 7; 1 Burr. 542; 6 East, 388.

10. *CHAMBERS v. CAULFIELD*, H. T. 1805, K. B. 6 East, 244; S. C. 2 Smith, 356. [192]

The plaintiff had entered into a deed with A. B. his wife, granting her certain sums of money in case she was obliged to live separate from him, with the approbation of named trustees. And the deed contained a clause that in case of such separation, certain of the children should live and be educated with the wife for a specified period, and that she should be at liberty to visit the others at his house, especially if ill.

There was also a proviso in the deed, that in case any separation should take place between the plaintiff and his wife, such separation should not prejudice or hinder either party from prosecuting any action or suit in law or equity not contrary or repugnant to the terms of that instrument, which either might have prosecuted in case no such separation had taken place. The plaintiff, after the execution of the deed, parted from his wife, but without the approbation of the trustees, and brought the present action against the defendant for criminal conversation with her after the separation. The jury found a verdict for the plaintiff with 2000*l.* damages. On a motion for a new trial, the Court were of opinion, that the question whether the mere fact of separation between husband and wife by deed, was or was not such an absolute renunciation of his marital rights as to prevent the husband from maintaining an action for the seduction of his wife, as concluded by the preceding decision, in *Weedon v. Timbrell*, did not arise. The case then before the Court, being confined to the construction of the particular deed produced in evidence, and that taking the whole of that instrument into consideration, it was evident

* In *Lister's case*, 8 Mod. 22, S. C. 1 Stra. 478; abridged post, tit. Baron and Feme, which was not adverted to in arguing *Weedon v. Timbrell*, it was observed by the Court that an agreement between husband and wife to live separate, and that she shall have a separate maintenance, shall bind them both until they both agree to cohabit again; and if the wife be willing to return to her husband, no court will interpose or obstruct her. And the husband should have leave to write to her, and to use any lawful means in order to a reconciliation, provided she was willing to see him, and that her children or servants should not hinder him, unless by her order. See also *Rex v. Mary Mead*, 1 Burr. 542.

No action lies for an act of adultery committed after the husband has surrendered* all claim to the society of his wife upon a formal agreement and subsequent separation.

But the renunciation of the husband's marital rights should be fixed and absolute to deprive him of his right of action.

that the only separation in the contemplation of the parties was a separation with the approbation of the trustees; and that as the wife had left the husband without such approbation, she was not at the time of the adulterous intercourse living separate from him by his consent, and consequently the event provided for in the deed had not happened; and in that view of the case there could not be any question but that the plaintiff's right to recover was not affected by the deed; and further if the wife had left the husband with the approbation of the trustees, yet, as the deed had provided "that the wife might have the care of the younger children of the marriage, and visit the others, more especially if they should be ill, so as to require the attention of a mother;" the husband had not in this case (as it was held he had done in the case of *Weedon v. Timbrell*) given up all the claim to the benefit to be derived from the society and assistance of his wife; consequently that the case of *Weedon v. Timbrell*) allowing it the fullest effect according to the terms of it, could not be considered as an authority against the plaintiff in this action.

If an illicit intercourse has been carried on by several during the same period, the husband may claim compensation from each.

[293] In pleading the statute of limitations, it should be not guilty within six years. At least this plea is good, if not specially debarred to.

11. *GREGSON, GENT. v. M. TAGGART*, T. T. 1808, N. P. 1 Campb. 415.

In this case it appeared that a prior action had been brought by the plaintiff against another person for adultery with his wife, and had recovered damages against the defendant, and charged him in execution; but no objection was made to the present action on the ground that it was barred in consequence of the former recovery, and the plaintiff obtained a verdict.

II. PLEADINGS* IN ACTIONS FOR.

1. *COKE v. SAYER*, H. T. 1759, K. B. 2 Wils. 85, S. C. 2 Burr. 753; Bul. N. P. 28,† *S. P. BATCHELOR v. BIGG*, M. T. 1739, C. P. 2 Bl. 855; S. C. cited *MACFADZEN v. OLIVANT*, 6 East, 388.

This was an action against the defendant for criminal conversation with the plaintiff's wife. The defendant pleaded two pleas; not guilty; and not guilty within six years. Verdict for 20*l.* upon the issue tried by the country; and on argument the demurrer to the plea of the statute of limitations was overruled.

2. *MACFADZEN v. OLIVANT*, E. T. 6805, 6 East, 387, 2 Smith, 486, S. C.

In this action the plaintiff declared in trespass against the defendant for having with force and arms assaulted and seduced his wife, whereby he lost the comforts of her society, &c. The defendant pleaded, 1st. Not guilty, and 2d. Not guilty, *infra sex annos*. Replication, joining issue on the first plea and general demurrer to the second. Joiner in demurrer.

Per Cur. If the question here were whether the limitation of six or four years only applied to this case, it might be material to consider whether this were an action of trespass or on the case; but the defendant having taken the longer period, and pleaded not guilty within six years, that of course must include not guilty within four years; and the plea not having been specially demurred to, is therefore good in either way of considering it; but even if the point as to whether it is an action of trespass or case had arisen, we should be inclined to consider it from the whole current of authorities, an action on the case.‡ Judgment for the defendant. See *Parker v. Ironfield*, cited 5 East, 391; 6 East, 395; S. C. 2 Smith, 445; 2 M. & S. 432; 2 N. R. 476; *Gould v. Johnson*, 2 Salk. 422.

* The venue is transitory, and the declaration may aver generally that the party is the plaintiff's wife; 3 Bulst. 196; the marriage being merely inducement to the right of action; *Gaard v. Hodge*, 10 East, 32; and a plea defending the act of adultery covers the entire charge; 3 Bulst. 196. In actions of this description the wife cannot be made a party; *Guy v. Livesey*, Cro. Jac. 501. See *Precedents of Declaration*, both in trespass and case. 3 Chit. Pl. 305, 306.

† In this work it is said, that "as the gist of the action is the criminal conversation, and not the assault, the proper plea under the statute of limitations is not guilty within six years."

‡ The usual arguments to show that the remedy is case, and not trespass, may be thus concisely stated:—1st. The wrong complained of is not immediate but consequential, the gist of the action not being the supposed assault on the wife, but the consequent corruption of her body and mind. 6 East, 339. 2d. That the plaintiff may declare with a *quod cum*, which is improper in trespass. 2 Salk. 636; 1 Stra. 621. 3d. That the injury may be stated to have been committed on divers days and times, &c. which is also untechnical

3. *GUARD v. HODGE*, T. T. 1808, K. B. 10 East, 32.

This was an action of adultery, the venue had been, changed on the usual affidavit from the county of M. to the county of D. A motion was made to bring back the cause to the former county, founded upon an affidavit that the marriage had been solemnized in Ireland; to this application it was objected that D. was the only place where criminal intercourse had been indulged, and that the place where the parties were married was perfectly immaterial. In this opinion the court concurred, observing, that the venue could only be brought back to the original county on the plaintiff undertaking to give material evidence there. Rule discharged. See 1 Tidd. 624. 6th edit.

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In an action for adultery the venue may be charged as in other transitory actions, and subject to the same restrictions.

III. EVIDENCE.

(A) FOR THE PLAINTIFF.

1. *MORIS v. MILLER*, E. T. 1767, K. B. Burr. 2057; S. C. 1 Bl. Rep. 632; S. C. Bull. N. P. 28.

In an action for crim. con. with the plaintiff's wife, it appeared in evidence that the plaintiff and his wife were married at May-Fair Chapel. The register or book could not be admitted in evidence; (stat. 26. Geo. 2. c. 3. 14.) the person who married them was transported; and the clerk who was present at the ceremony was dead; so that the plaintiff could not establish the actual marriage by any legal proof.* It was, however, shown, that the defendant, on being asked where Mrs. Morris was, answered, "in the next room." She being there with him, this, it was contended, was an admission of the marriage, and conclusive against the defendant. But the judge at the trial nonsuited the plaintiff; and, on a motion to set it aside, it was decided *Per Cur.* That in an action for criminal conversation with the plaintiff's wife, there must be evidence of a marriage: in fact acknowledgment, cohabitation, and reputation, are not sufficient. A different rule would be subject to great inconvenience; it might render persons liable to action of this description, founded upon the evidence made by the very parties who bring the action.

In this action the actual solemnization of the marriage must be proved, and secondary evidence is inadmissible.

2. *BIRT v. BARLOW*, M. T. 1779, K. B. Bull. N. P. 27; Doug. 171. S. C.

In an action for criminal conversation with the plaintiff's wife the first witness called proved a copy of the register of the parish of St. A. in *hæc verba*, in trespass for an assault. 6 East, 391, 395. 4th. That the plea of the statute of limitations is not guilty within six years; 2 Burr. 735; 6 East, 387; and not as in trespass for an assault within four years. 2 Salk. 420. And lastly, That the plaintiff is entitled to full costs, though he should not recover 40s. damages. 3 Wils. 319 1 Salk. 206; 2 Ld. Raym. 831.

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A marriage in fact, may be proved either by a copy of the register or by parol testimony.

On the other hand it has been urged, that all the ancient entries and modern precedents describe the injury as committed with force; (see Precedents referred to in Petersdorff's Index, 16.) and that that allegation is introduced upon the legal supposition that the wife, having no power to consent, the criminal intercourse must have taken place under coercion and restraint. 7 Mod. 79; 3 Bl. Com. 139. But Sir J. Mansfield, in delivering judgment in *Woodward v. Walton*, 2 N. R. 476; which was an action for seduction, introduced the following observations:—A little confusion has arisen in some of the cases from the insertion of the words *vi et armis* in actions on the case, those words being generally applicable to actions of trespass only; and I certainly do not recollect to have seen them used in actions upon the case. In actions like the present, as far as my recollection goes, the form of the declaration has always been in trespass *vi et armis* and *contra pacem*. I cannot distinguish between this action and an action for criminal conversation. If that be the subject of trespass, this must be so too. In the action for criminal conversation, the violence is not the ground of the action; both in that case and in this, if the injury were committed with violence, it would amount to a rape. I do not see, therefore, any good reason why either of them should be the subject of an action of trespass. But it seems from the cases which we have looked into, that the action for criminal conversation has been considered for years as the subject of an action of trespass. In actions by a master for an assault upon his servant *per quod servitium amisit*, there is no trespass against the plaintiff, the sole foundation of the actions is the loss of service, yet this also has been considered as an action of trespass. All these cases are the same in principle, and fall within the same rule. In *Ditcham v. Bond*, 2 M. & S. 436. the case of *Woodward v. Walton*, was distinctly recognized.

* See post, Bane; Marriage; and stat. 26 Geo. 2, c. 33; 3 Geo. 4, c. 74; and 4 Geo. 4, c. 17.

Mr. Justice Buller, p. 28, after citing the case of *Morris v. Miller*, he says, "So where the defendant was surprised at a lodging with the plaintiff's wife, and on being asked where Major Morris' wife was, he answered, 'in the next room.' This was held not to

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The identity may be proved by other evidence than the subscribing witnesses.

Anabaptists not being within the marriage act, it is sufficient to prove a marriage according to that faith.

Where the marriage has been solemnized

no evidence in the first instance was offered to show that marriage had been in chapel, the plaintiff must prove that banns were usually published there before the marriage act; but the production of an old register of marriages solemnized in the chapel before the act, and proof of frequent marriages being solemnized since the act will be sufficient.*

1767, No. 106. I. B. Esq. of the Parish of St. M. in the county of K. and H. C. of this parish, married by banns, Dec. 15, 1767, by J. L. minister; witness, R. A., F. C., A. L. and E. L. A witness was then called to prove the fact of adultery; and the plaintiff's counsel stated that the identity of the parties would come on the examination of the witnesses who would prove the adultery; but the judge directed the plaintiff to be nonsuited, on the ground that the identity of the parties ought to be proved by the minister or some of the attesting witnesses, unless their not being produced could be accounted for in the same manner as is required in the case of subscribing witnesses to a deed. It was moved that this nonsuit might be set aside, and a new trial granted. *Per Cur.* Registers are in the nature of records; and need not be produced, nor proved by subscribing witnesses. A copy is sufficient, and is proof of a marriage in fact between two parties describing themselves by such and such names and places of abode, though it does not prove the identity. An action for crim. con. is the only civil case where it is necessary to prove an actual marriage. (See *Leader v. Barry*, 1 Esp. 353; *Dickenson v. Davis*, 1 Stra. 480; 2 Rol. Abr. 551. c. 5; *May v. May*, Bul. N. P. 112; *Hervey v. Hervey*, 2 Wm. Bl. 877; Bac. Ab. Trial, 16; 1 Wentw. Pleadings, 62; 2 Saund, 66. S. C.) In other cases, cohabitation and reputation are equally sufficient. But an action for crim. con. has a mixture of penal prosecution; for which reason, and because it might be turned to bad purposes by designing persons giving the name and character of wife to women to whom they are not married; in such an action a marriage in fact must be proved. A marriage in fact is sufficient, because marriages are not always registered; there are marriages among particular descriptions of dissenters, where the proof by a register would be impossible. But as to the proof of identity, whatever is sufficient to satisfy a jury is good evidence. If neither the minister nor the clerk, nor any of the subscribing witnesses, were acquainted with the married couple, in such a case none of them might be able to prove the identity. But it may be proved many other ways; suppose the bell ringers were called, and proved that they rung the bells, and came immediately after the marriage, and were paid by the parties; suppose the handwriting of the parties were proved; suppose persons called who were present at the wedding dinner, or the like. In this case, the wife's maiden name was H. C.; suppose a maid servant had proved that she always went by that name till the day of marriage; that she went out that day, and on her return, and ever since was called Mrs. B.; that would have been evidence of the identity. Rule absolute. See 26 Geo. 2. c. 16. § 15; Blac. 632.

3. *WOOLSTON v. SCOTT*, Norfolk Lent Assizes, 1753, Bul. N. P. 28; 1 Selw. N. P. 22. 5th edit.

In an action for adultery, it appeared that the plaintiff was an anabaptist. Denison, J. held, that as this is an action against a wrongdoer, and not a claim of right it was sufficient to prove the marriage according to the plaintiff's form of religion. Verdict for the plaintiff.

4. *TAUNTON v. WYBORN*, M. T. 1809, N. P. 2 Campb. 297.

The parties had been married in the chapel of the Tower of London, but no evidence in the first instance was offered to show that marriage had been in chapel, the plaintiff must prove that banns were usually published there before the marriage act; but the production of an old register of marriages solemnized in the chapel before the act, and proof of frequent marriages being solemnized since the act will be sufficient.*

be sufficient, for it is only a confession of the reputation, and that she went by the name of the defendant's wife, and not a confession of the fact of the marriage." This decision, therefore, in the case of *Morris v. Miller*, does not warrant the conclusion that a distinct and full acknowledgment of the marriage, made by the defendant himself, will not be evidence of the fact as against him, and sufficient to dispense with the more formal and strict proof of marriage, but, on the contrary, an opposite inference may properly be collected from the statement of Mr. Justice Buller, namely, that such an acknowledgment is good evidence of the fact of marriage against the party acknowledging.

* The 4 Geo. 4. c. 76, s. 26, enacts, that after the solemnization of any marriage under banns, it shall not be necessary, in support of such marriage, to give any proof of the actual dwelling of the parties in the respective parishes or chapelries wherein the banns were published; or, where the marriage is by licence, it shall not be necessary to give any proof

usually solemnized there prior to the 26 G. 2. c. 33. nor was any register or banns produced. It was urged that this species of evidence was necessary; and Lord Ellenborough adopting that proposition, an old register of marriages solemnized in the chapel before the passing of the marriage act, and a register banns published there since, and establishing by the testimony of living witnesses that marriages had been solemnized and banns published there of late years, his Lordship held to be good *prima facie* evidence. See *Rex v. Northfield*, 2 Doug. 659; Stat. 4 Geo. 4. c. 76. s. 26.

5. *HOWARD v. BARTONWOOD*, T. T. 1776, C. P. 1 Esp. N. P. Dig. 362. S. P. *REED v. PASSEN*, Peake, N. P. C. 303. *COOK v. LLOYD*, Salop Summer Assizes, 1803. 1 Selw. N. P. 24. *LLOYD v. PASSINGHAM*, 1 Cooper, Ch. C. 255; S. C. 16 Ves. 59.

This was an action of crim. con. The marriage was proved by a person who was present when it was solemnized in the Fleet, in the year 1737, and the plaintiff's counsel offered to give in evidence the Fleet register in confirmation of the oral testimony. De Grey, C. J. refused the evidence, stating the ground for rejecting to be, that the whole of the transaction was illegal, and the register made by a person under no tie, and therefore not entitled to credit.

6. *DUKE OF NORFOLK v. GERMAINE*, M. T. 1692, K. B. 8 St. Tr. 36.

The Chief Justice, in addressing the jury, after stating that the declaration had charged the defendant with having enticed away the plaintiff's wife on a particular day, and continued to live in adultery with her, and that the defendant had pleaded the statute of limitations that he was not guilty within six years, observed, that what was proved to have been done before that time was to be dismissed from their attention with regard to the damages, but that it had been properly admitted in evidence, to explain the nature of the intimacy between the parties; that he was clearly of opinion that such matters might be proved by way of explanation, but that they ought not to be given in evidence for any other purpose. See Co. Lit. 282. a. 1; 2 Roll. Ab. 687. 689; Com. Dig. Pl. (S. 12.) 2 Saund. 5. (n. 3.)

7. *BAKER v. MORLEY*, Guildhall, 1789, Bul. N. P. 28.

The confession of the wife will be no evidence against the defendant, but a discourse between her and the defendant may be proved; so letters, written to her by the defendant, may be received in evidence against him.

8. *EDWARD v. CROCK*, T. T. 1801, N. P. 4 Esp. 39.

In this case, the plaintiff and his wife being both servants, and living in different families, and thus necessarily living apart, letters written by her to her husband, before any suspicion of the adultery, were admitted by Lord Kenyon, to prove the state of connubial affection subsisting between the parties before the the criminal connexion, but clear evidence was required as to the actual time of writing them.

9. *TRELAWNLY v. COLMAN*, M. T. 1817, K. B. 1 B. & A. 90; S. C. 2 Stark. 191.

This was an action for adultery; and the plaintiff, with a view of showing the degree of attachment which subsisted between him and his wife, tendered that the usual place of abode of one of the parties for fifteen days, as aforesaid, was in the parish or chapelry where the marriage was solemnized, nor shall any evidence in any suit in either of the said cases be received to prove the contrary. Although, as stated in the text, an entry of marriage in the parish register is evidence that the persons therein named were married on the day specified by banns or licence, as the case may be, yet such an entry is not essential to the validity of the marriage, so that, if it has not been expressed in the regular form, the only consequence will be that it cannot be admitted as evidence of the marriage, which must therefore be established by some other medium of proof. (See *Reed v. Paper*, Peake, N. P. C. 281; 1 Esp. N. P. C. 281.) The copy of a register of a foreign chapel cannot be admitted here as a proof of a marriage abroad; (*Leader v. Bury*, 1 Esp. N. P. C. 353, and see *Huet v. Le Mesurier*, 4 Cox, Co. 275; the stat. 4 Geo. 4. c. 91; and *Letson v. Tensdale*, 8 Taunt. 880.) Nor is a Jewish marriage sufficiently proved in a civil action by calling witnesses who were present at the ceremony which takes place in the synagogue, and which is merely a ratification of a previous written contract; the contract itself should be produced. *Horn v. Noel*, 1 Camp. 61; see Peake, N. P. C. 17.

* In *Doe dem. Passingham v. Lloyd*, Salop Summer Assizes, 1794, cited 1 Selw. N. P. 21, Heath, J. admitted these books in evidence.

A register of Fleet marriages is not legal evidence of a marriage.* The plaintiff may prove sever al acts of a daltory with in the times specified, and in addition to this he may show indecent famili arities ante cedent to the first mentioned day, though he cannot show a pre vious criminal connexion.

Confession of th wife not evi dence; dis course be tween her and defend ant admissi ble, or let ters written to her by defendant; Or letters written by the wife du ring an ab sence from her has band may be produ ced in evi dence to show her feeling to wards him.

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Provided it
can be pro-
ved that
they were
not written
subsequent-
ly to their
date.

An unsuccess-
ful attempt to im-
pugn the
husband's
conduct
will not au-
thorize the
admission
of evidence
in support
of his char-
acter.*

Proof may
be admitted
on the part
of the plain-
tiff, of the
wife's decla-
ration, as
to her inten-
tion and
purpose in
leaving his
house, to
rebut all
suspicion of
connivance

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The defend-
ant may
prove that
the wife
was a wo-
man of no
toriously
bad charac-
ter;

Or that she
made the
first advan-
ces to defend-
ant;

Or that the
plaintiff
had turned
his wife out
of doors.

in evidence a letter written by her to him, during her temporary absence in the country, but after an adulterous intercourse had taken place. It was contended for the defendant that the letter was inadmissible; but the judge at the trial overruled the objection; and the Court, on a motion for a new trial, observed, that whether there be a temporary absence or protracted separation, the letters of the wife to the husband written during the separation, and before any suspicion of her misconduct, is admissible; as showing her conduct and demeanour to her husband. What the husband and wife say to each other is beyond all question evidence to show their demeanour and conduct, whether they were living on better or worse terms; what they write to each other may be liable to suspicion; but when that is cleared up, all ground of objection fails.

10. KING v. FRANCIS, H. T. 1800, N. P. 3 Esp. 116.

Action for adultery. In the course of cross-examining the plaintiff's witnesses, the counsel for the defendant endeavoured, though unsuccessfully, to throw some imputations on the moral character of the plaintiff. It was then proposed to call evidence to sustain the propriety of the plaintiff's conduct. But Lord Kenyon was of opinion, that although the cross-examination of the plaintiff's witnesses had been directed to impeach the character and conduct of the plaintiff, he did not think this authorised him to break through the rule of evidence, by admitting proof of character, as that character stood unimpeached by the testimony of the witnesses examined, who had denied the imputation intended to be conveyed.

11. HOARE v. ALLEN, H. T. 1801, N. P. 3 Esp. 276.

In this case, which was an action for adultery, a witness was called by the husband in order to remove all suspicion of connivance on his part, to prove the representation made by the wife to him of the place to which she was going previous to her elopement. The Court of King's Bench were of opinion, that this evidence formed part of the *res gesta* and was therefore admissible.

(B) FOR DEFENDANT.†

1. RIGBY v. STEVENSON, 1645, Stafford. Coram Foster, J. Bul. N. P. 27; Gilb. Ev. 113. ed. 1761.

The defendant may give in evidence, that the wife had a bastard before marriage; but he will not be permitted to give evidence of the general reputation of her being, or having been, a prostitute, for that may be occasioned by her familiarity with the defendant, though perhaps, after having laid a foundation by proving her being acquainted with other men, such general evidence may be admitted.

2. ELSAM v. FAWCETT, T. T. 1796, K. R. 2 Esp. N. P. C. 652; S. C. GARDINER v. JARDIS, March 2, 1805, 1 Selw. N. P. 24.

Upon not guilty pleaded to an action for crim. con. the defendant to prove that the plaintiff's wife had not been seduced by the former, but that she had made the first criminal advances, produced letters written by the wife to the defendant before his connexion with her, soliciting a criminal intercourse. Per Lord Kenyon, C. J. The letter may be received in evidence, as it was written antecedent to the adultery having been committed. But his Lordship refused to admit evidence of acts of misconduct subsequent to her criminal intercourse with the defendant.

3. CIBBER v. SLOPER, Bull. N. P. 27.

Per Lee, C. J. It may be proved, on the part of the defendant, that the plaintiff turned his wife out of doors, and refused to maintain her. See judgment of Buller, J. in *Duberley v. Gunning*, 4 T. R. 657.

* If the wife's character for chastity has been attacked, whether by the testimony of witnesses, called on the part of the defendant, or by the course adopted in the cross-examination of plaintiff's witnesses, evidence in support of her character will be properly admitted, either in chief, or in reply; even though the cross-examination may have failed in its object. 2 Phil. Ev. 156.

† See the case where the action is not sustainable, ante, p. 289.

IV. OF THE DAMAGES,* AND GRANTING A NEW TRIAL.

1. WILFORD v. BERKELEY. T. T. 1727. K. B. 1 Burr. 609. CHEM v. BRIGG. M. T. 1719. K. B. Id.

A motion was made for a new trial in consequence of the jury having in an action for crim. con. given 500*l.* damages, the defendant being only a clerk in the Exchequer at a salary of 50*l.* *per ann.* which appeared to be his whole subsistence. But the Court were clearly and unanimously of opinion, that although there was no doubt of their power to exercise a proper discretion in setting aside verdicts for excessive damages, in cases where the *quantum* of the loss really suffered by the plaintiff would be apparent, or they were of such a nature that the court could properly judge of the degree of the injury, and could see manifestly that the jury had been outrageous in giving damages as greatly exceeding the injury; yet the case was very different where it depended upon circumstances which were properly and solely under the cognizance of the jury, and were only fit to be submitted to their decision and estimate. And they held the case of criminal conversation with another man's wife to be of this latter kind; for the injury suffered by the husband, and the estimate of the damages to be assessed, must in their nature depend entirely upon circumstances, which it was strictly and properly the province of the jury to determine; and in the present case, the court could not say that 500*l.* was too much, or that 50*l.* would have been too little.

Formerly the Court would not grant a new trial on the ground of excessive damages. [800]

2. DUBERLY v. GUNNING. E. T. 1792. K. B. 4 T. R. 651.

In an action for crim. con. the plaintiff proved many indecent familiarities between him and the lady in the presence of her husband, from whence the jury might have inferred connivance. The judge who tried the cause told the jury, that if they thought the husband had consented to the infidelity of his wife, the action could not be maintained, and they ought to find a verdict for the defendant. But if they thought that though he had not gone that length, yet if they were of opinion that he had been guilty of gross negligence or inattention to her conduct with the defendant, that circumstance should go far in mitigation of damages; and that he himself thought that the husband was not exempt from blame, and that nominal damages would be sufficient. But if they could see no ground for imputing such neglect, then they were to assess what damages, under all the circumstances, they might consider him entitled to. A verdict was given to the plaintiff, with 5000*l.* damages. A new trial was afterwards moved for on the ground of excessive damages. *Per Cur.* (*Buller. J. dissentiente.*) Although we are of opinion that the Court has the power in all cases where particular circumstances present themselves, to order a new trial when excessive damages may have been given; and although we agree that here the damages are erroneous, yet we are compelled to refuse to set the verdict aside. The damages, in actions of this description, depend entirely upon mere sentiment and opinion, and the court have no certain rule to ascertain how far they were excessive; we cannot interfere and set up our own judgment against that of the jury, to which the constitution has referred the question of damages; nor can any instance of the court granting a new trial in such cases be produced, though many instances have occurred where the damages have been manifestly excessive. *Rule discharged.* See 5 T. R. 357; 2 *id.* 166; 4 *Bac. Abr.* 552; *Willes*, 244; 6 *East*. 244; 2 *Mod.* 150; 1 *Burr.* 609. 2 *Wils.* 405; 3 *id.* 61; *Bull. N. P.* 97; *Sty.* 462; 1 *Stra.* 692; 1 *Burr.* 394; *Palm.* 314; *Salk.* 649; 2 *Blac. Rep.* 1327; *Comb.* 170; 3 *Burr.* 1845; 1 *Lev.* 97; 1 *Selw. N. P.* 10. 1225.

Even where the judge who tried the cause thought the damages much larger than they ought to have been, and declared that he would have been satisfied if nominal damages only had been given, a new trial was refused.

* The damages are generally considerable, they necessarily depend upon the peculiar circumstances disclosed in evidence; that is, they are increased or diminished from the consideration of the rank and quality of the plaintiff; from the peculiar turpitude of the case, as if the defendant was the friend, relation, or dependant of the plaintiff; if it appear that the plaintiff and his wife lived happily before her acquaintance with the defendant; or that the wife had always borne a good character till then; or that there was a settlement and provision for the children of the marriage. All these go in aggravation of the damages, in which also the circumstances and property of the defendant are always considered.

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But the Court will now grant a new trial if they are satisfied that the jury acted under gross misconception, or from improper motives. In trespass for crim. con. a verdict for less than 40s. carries full costs; although the judge does not certify.

3. CHAMBERS v. CAULFIELD. H. T. 1805. K. B. 6 East. 256.

Lord Ellenborough, in this case, in delivering the opinion of the Court, observed, that if it appeared to them from the amount of the damages given as compared with the facts of the case laid before them, that the jury must have acted under the influence, either of undue motives, or some gross error or misconception, the Court would think it their duty to submit the question to the consideration of a second jury. See tit. *Damages, post*.

V. COSTS.

BACHELOR v. BIGG. M. T. 1772. K. B. 3 Wils. 319; S. C. 2 Black. 854. S. P. *Per Grose J.* in WEEDON v. TIMBRELL. T. T. 1793. K. B. 5 T. R. 361.

In an action of trespass and assault against the defendant for crim. con. with the plaintiff's wife, *per quod consortium amisit*; the jury gave one pound, eleven shillings, and sixpence, damages, and there was no certificate. The prothonotary having taxed full costs for the plaintiff, a rule was obtained to show cause why this taxation should not be set aside, because it was alleged, this action fell within the provision of the statute 22 & 23 Chas. 2. whereby the plaintiff, there being no certificate of the sufficient proof of an assault and battery, could have no more costs than damages, the latter being under forty shillings. For the plaintiff it was argued, that this was not an action of assault and battery, but of assault only; for though it was laid in the declaration, that the defendant with force and arms, &c. had made an assault upon the plaintiff's wife, yet the words assault and force and arms, were mere words of course, and only matter of form. The gist and substance of the action was the criminal conversation, and therefore the wife was not joined; and besides that, no battery was laid or charged in the declaration. And of this opinion were the Court, and said that this was an action of trespass in nature of an action upon the case, for the special damage. *Rule discharged with costs.* See *Cro. Jac.* 502; 2 *T. R.* 167; 3 *Wils.* 18; 3 *Burr.* 1878; 6 *East.* 248. 387; 2 *N. R.* 476.

An advertisement, though injurious to another, if inserted *bona fide* with a view of investigating a fact in which the advertiser is interested, is not libellous.

Adverse Possession. See tit. *Covenant; Ejectment; Nuisance; Watercourse; Way.*

Advertisement. See also tit. *Libel; Newspaper.*

1. DELANY v. JONES. T. T. 1802. K. B. N. P. 4 Esp. 191.

An advertisement was inserted by the defendant in a newspaper, offering a reward of ten guineas to any one who could give information whether the plaintiff (describing him) was married previous to nine o'clock on the morning of the 1st August, 1799. It was contended for the plaintiff that this was libellous, as meaning to impute bigamy to him; it was on the other hand argued for the defendant, that it was put in by the plaintiff's wife to procure information as to whether the plaintiff had another wife living. In summing up to the jury, *Lord Ellenborough* left them to say *quo animo* it was published; if it was to impute bigamy to the plaintiff it was libellous; but if fairly put in by the wife, for the purpose suggested, that it was not so. Verdict for defendant.

2. BROWN v. CROOME. M. T. 1817. N. P. 2 Stark. 297.

Action for libel. It appeared that a commission of bankruptcy had been sued out against the plaintiff, and the libel complained of was contained in an advertisement published in a newspaper addressed by the defendant to the plaintiff's creditors, calling on them to adopt measures to prevent certain favoured parties from deriving benefit from forced sales and bills of exchange obtained by the plaintiff, to give the favoured creditors an unjust preference. It was objected, that as the advertisement was inserted for a legitimate purpose, it could not be deemed a libel. But *Lord Ellenborough* was clearly of opinion, that although the advertisement had been inserted with the avowed intention of convening a meeting of the creditors with the design of consulting upon the measures proper to be adopted for their own security; yet if the legal object could have been attained by means less injurious, the publication was a libel.

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But if it contain unnecessary reflections on the plaintiff's character, though inserted for the purpose of calling his creditors together for a legitimate purpose, it is a libel.

Advice. See tit. *Bills of Exchange and Promissory Notes.*

Advocate. See tit. *Barrister ; Mandamus.*

Ad Voluntatem Domini. See tit. *Copyhold.*

Advowson. See tit. *Simony.*

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- II. OF DONATIVE ADVOUSONS, p. 305.
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- VIII. OF THE REMEDIES CONNECTED WITH ADVOUSONS.

(A) QUARE IMPEDIT.

(a) *When maintainable*, p. 335. (b) *Process, pleadings, and evidence*, p. 336. (c) *Damages, judgment, and costs*, p. 352.

I. OF PRESENTATIVE ADVOUSONS,* APPENDANT† AND [303] IN GROSS.‡

1. REYNOLDS v. BLAKE. E. T. 1696. K. B. 3 Salk. 25 ; 1 Ld. Raym. 198 ; S. C. 3 Lev. 437.

In a *quare impedit*, the Court was of opinion, that where the owner of a manor to which an advowson was appendant, accepts a fine of the advowson, with a grant and render back of every second turn ; now for such turn the advowson is in gross, but for other turns the appendancy still continues. But if a man levy a fine of the advowson, and accepts a grant and render of every other turn, the appendancy is destroyed, because there was an instant of time in which it became severed. So where there are two coparceners of a manor,

* An advowson is a right which a man has of nominating a proper person to fulfil the duties and to receive the profits, of an ecclesiastical benefice. Anciently, the bishop had the sole cure of souls throughout his whole district, and received all the profits, which he and the clergy distributed into four parts ; one to the bishop to maintain hospitality, and support the clergy residing with him ; one for the building and repairing of churches ; one for the poor ; and one to support the inferior clergy whom the bishop used to send to particular places, as his deputies, and to remove or recal at his pleasure. As soon, however, as tithes were established as a law, that is, before or about the time of Charlemagne, it was usual for the bishop to allocate to his vicar or curate, in any district, the whole or part of the tithes or other profits arising there. When the feudal lords, for the sake of having divine service performed in their districts, were willing to alienate part of their lands to the church, for the purpose of building houses for the parson, and providing a competent glebe for him, and for building new churches where they were wanted, they were allowed in return to nominate a clergyman to the bishop, who, if he was qualified, was obliged to admit him. These grants being insufficient alone for the maintenance of a parson, were not made without the consent of the bishop to allocate, in aid of the glebe, the tithes of that precinct to the use of the parson, who now began to have a permanent interest for life in his parish.

This was the origin of presentative advowsons, in which, though a matter ecclesiastical, the lay patron was allowed to have a temporal and valuable interest, inasmuch as it might serve as a provision of one of his children, or any other relation that was qualified for it ; and, as at the time that these glebes were granted most fiefs were hereditary, this right of advowson presentative descended to the heir.

† The right of presentation, which was originally allowed to the person who built or endowed a church, became by degrees annexed to the manor in which it was erected, for the endowment was supposed to be parcel of the manor, and therefore it was natural that the right of presentation should pass with the manor from whence the advowson was said to be appendant, being so closely annexed to the manor, that it will pass as incident thereto by a grant of the manor without any other words.

An advowson is appendant to the demesnes of the manor, which are of perpetual subsistence and continuance, and not to the rents or services, which are subject to extinguishment and destruction. See Mirehouse on Advowsons, 7. *et seq.*

‡ Advowsons in gross are when they exist as personal rights, independent of any corporeal hereditament. Hill v. Grange, Plow. Rep. 170. Except in a few cases, an advowson in gross can never be appendant again. See 1 H. Bl. 426 ; 1 Salk. 24 ; 2 Salk. 560 ; and Mirehouse, 15.

A fine sur grant. et render. will destroy the appendancy of an advowson. On the partition of a manor, if an advowson be excepted, it becomes in gross.

to which an advowson is appendant, and they make partition of the manor, without taking notice of the advowson, at every other turn it is still appendant; but if there had been any express exception of the advowson it would then be in gross. So if coparceners make a partition of the manor, and the demesnes are assigned to one, and the services to another, the manor is destroyed, and the advowson becomes in gross; but if on partition the advowson is allotted to one coparcener, and the manor to which it is annexed to the other, and after one dies without issue, by which the law unites them again, the advowson, which was once severed and became in gross, is now become again appendant. See 1 *Inst.* 1224; 6 *Rep.* 64; 8 *Rep.* 796.

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A reversion of a manor to which an advowson is appendant, usurps; then the particular estate that determines the advowson is become again appendant. Or where served only conditionally, as in the case of a mortgage, it will be re-united again if the condition is performed.

But when an advowson appendant has been presented to the patron as an advowson in gross, it cannot ever be appendant again.

2. *REX v. THE BISHOP OF CHESTER.* H. T. 1696. K. B. 1 *Ld. Raym.* 302.

Tenant in tail of a manor, to which an advowson is appendant, reversion to the queen in fee, tenant in tail commits treason; then the queen in reversion usurps; by this the advowson is in the queen in gross; afterwards tenant in tail is attainted, the advowson is become appendant again, for the appendancy was not destroyed by the usurpation; for though it was severed from the estate tail, yet it was not severed from the fee; then by the attainder the estate tail is wholly extinct, and the queen is seised in her reverter. As if there is tenant for life of a manor to which an advowson is appendant, the reversion in fee to B. E. usurps upon the tenant for life; the advowson is become in gross; but if the tenant for life dies, it is become appendant again.

See *Hob.* 323; *Sir William Elvis's case.*

3. *THE KING v. THE BISHOP OF CHESTER.* E. T. 1696. K. B. 3 *Salk.* 35; S. C. 1 *Ld. Raym.* 294; *Skin.* 651.

In *quare impedit* it was holden by *Lord Holt, C. J.* and assented to by the Court, that where an advowson is appendant to a manor, and the patron mortgages the manor in fee, excepting the advowson, the advowson is in gross, unless the money is actually paid at the day; in which case it becomes again appendant, and if it is paid after the day, though it may be appendant in reputation, and may pass by the name of an advowson appendant in a grant or other conveyance; yet in fact the appendancy is destroyed, the advowson having been once legally severed from the manor by the act of the party.

4. *REX v. THE BISHOP OF CHESTER, PIERCE, AND COOK.* H. T. 1696. K. B. 2 *Salk.* 560; 1 *Ld. Raym.* 292.

In *quare impedit*, the plaintiff declared that Queen Elizabeth, on the 14th day of February, in the 12th year of her reign, was seised of the advowson of B. *ut de uno grosso*, and presented S. That the queen died, and it descended to King James, and he was seised *ut de grosso*; so to King Charles, and he was seised *ut de grosso*, and presented to W. and that afterwards W. died, and one J. Pierce, *non habens jus, sed usurpando, præsavit* Metcalfe. That King Charles I. died seised, and it descended to King Charles II. Defendant pleaded that King Charles I. was seised in gross, but that he, after his presentation of W. by letters patent, granted the advowson to one T. *adtunc armigero postea militi. Et quod prædicto tempore quo* Pierce is supposed to have usurped *super dominum regem, ipse idem Pierce usurpavit super dict. W. T.* and presented Metcalfe, *et quod postea*, the said T. released the advowson and his right therein to him the said J. Pierce and his heirs, and traversed the dying seised of King Charles I. Oyer was prayed of the letters patent, which recited, that Queen Elizabeth, in the 13 year of her reign, granted the manor of B. with the advowson *adinde spectan'* to the Earl of Warwick, and that the said manor was come to T. *knt. sciatis igitur nos dedisse et concessisse præfuto, T. mil advocationem ecclesiæ predict'*; and, upon demurrer to the plea. Judgment was given in K. B. for the king, and a writ of error brought; and thereupon it was objected, that the advowson which the king meant to pass was an advowson which Queen Elizabeth granted to the Earl of Warwick; and that the grant to the Earl of Warwick was void; for the queen, *anno 12 regni sui*, being seised of this advowson *ut de grosso*, could not *anno 13* grant this as an advowson appendant, and that this is admitted by the defendant. And if this was advowson in gross, and so descended to Charles I. his confirmation or grant to T. upon a supposal wherein

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he was deceived, will be void, and that the said T. in the letters patent, and the T. in the grant, appeared to be different persons. On the other side it was argued, that the queen might be seised of it as appendant when she granted it to the Earl of Warwick, for she might have the advowson again after the grant to the Earl and then present; and that the Court ought to intend every thing to make the king's grant good. Judgment for the plaintiff. *See Wats. C. C. L. c. 7. 68; Rex v. the Bishop of Rochester, 1 Mod. 195; S. C. 2 Mod. 1; 3 Keb. 412.*

II. OF DONATIVE* ADVOWSONS.

1. *LADD v. WIDDOWS.* M. T. 1702. K. B. 2 Salk. 541: S. C. 3 Salk. 140; S. C. 2 Ld. Raym. 989. not S. P.

Upon a motion for a new trial in a *quare impedit*, whether the church was a presentative or presentative, evidence was offered of several presentations; and the Court, (*Holt, C. J.* and *Powell, J.*) held, that though a presentation might destroy an impropriation, yet it could not destroy a donative, because the creation thereof was by letters patent, whereby land is settled to the parson and his successors, and he to come in by donation. *See 1 Inst. 344; F. N. B. 35; Cro. Jac. 63.*

2. 3 Salk. 140.

Donatives are either by royal foundation, or by royal licence, as by original agreement with the ordinary, but after it is established the ordinary hath nothing to do with it; it is visitable by the patron's commissioners; it must be resigned to the patron; no lapse can occur. But *per Holt, C. J.* The ordinary hath a power as to the parson, though not to the place; for if the parson marries without a licence, or commits any misdemeanor, the ordinary may punish him in that respect, but he cannot regulate the seats in the church; and if the patron will not present, the ordinary may compel. The parson is exempted from attendance at visitations. *See 1 Inst. 344; 2 Inst. 122; Cro. Jac. 63. 515; Rex v. the Bishop of Chester, 1 T. R. 396; 1 Geo. 1. st. 2. c. 10.*

3. 3 Salk. 141.

The incumbent of a donative was cited in the spiritual court to take a licence from the bishop to preach, and the pretence was, that it was a chapel, and that the parson was a stipendiary. *Per Cur.* If it is a donative, and the bishop will visit, a prohibition shall be granted. *See 1 Mod. 90.*

4. *COLEFALL v. NEWCOMB.* M. T. 1704. K. B. 2 Ld. Raym. 1205.

A minister of a donative was libelled in the Ecclesiastical Court for not reading the whole service, but leaving out what parts of it he thought proper, and for preaching without licence. A prohibition was moved for upon a suggestion that the church was a donative; and it was argued that donatives were exempt from the jurisdiction of the ordinary, and that it was a lay thing, and the bishop could not visit it; and that, if the incumbent was guilty of heresy, the ordinary could not meddle with him, for the parson was privileged in respect of the place; but the patron might, by commission, examine the matter, and upon cause, deprive him; *Yelv. 61. 62. Fairchild v. Gaire; 2 Cro. 63. S. C.; and Co. Lit. 344.* that the founder shall visit them; and *Bro. Præmunire, 21.* to the same purpose. But *per Cur.* There is a difference where the suit in the Ecclesiastical Court is in order to deprivation, and where only for reformation of manners; in the first case the Court will prohibit, but not in the last; and therefore, if in this case the spiritual court proceeded to deprivation, the Court would prohibit them, but not till then. *See 12 Mod. 640; 3 Salk. 141; 3 Wils. 361.*

* An advowson donative is when the king, or any subject by his licence, founds a church or chapel, and ordains that it shall be merely in the gift or disposal of the patron, subject to his visitation only, and not to that of the ordinary, and vested absolutely in the clerk by the patron's deed of donation, without presentation, institution, or induction. Lord Coke says, that if the patron of a donative doth once present to the ordinary, and his clerk is admitted and instituted, the church is by that means become presentative, and shall never after be donative. *See 1 Inst. 344; F. N. B. 42; 2 Bl. Com. 22. 25; Seld. on Tithes, ch. 12. 392; Cro. Jac. 63; 3 Salk. 140; 3 Wils. 355.*

5. THE ATTORNEY-GENERAL V. THE BISHOP OF LONDON. E. T. 1692. K. B.
4 Mod. 213.

The presentation, on an incumbent of a donative being made a bishop, does not devolve to the king.

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Per Cur. If the incumbent of a donative be made a bishop, the king shall not present, because such a promotion does not create an avoidance by cession for the incumbent is the creature of the founder, and is not subject to ordinary and episcopal visitation. This must be admitted to be law; but yet, if an incumbent of a donative be made rector by act of parliament, then the king has a prerogative to present upon the promotion of such rector.

See *Vaugh.* 18; 2 *Roll. Ab.* 344; *Winch.* 91; *Hob.* 143; 1 *T. R.* 1399.

III. OF COLLATIVE ADVOWSONS.

[An advowson collative is where the bishop and patron are one and the same person, in which case the bishop cannot present to himself; but he does by one act of collation, or conferring the benefice, the whole that is done in common cases, by both presentation and institution. See 2 *Bl. Com.* 22; 1 *Inst.* 344; 6 *Co. Rep.* 50. a; *Hob.* 242. 301; *Morehouse.* 40.]

IV. OF THE TRANSFER OF ADVOWSONS.

REX V. THE BISHOP OF ROCHESTER AND SIR FRANCIS CLARK. H. T. 1673.
C. P. 2 Mod. 1; S. C. 1 Mod. 195; S. C. 3 Keb. 412.

The king, being seized of a manor to which an advowson is appurtenant, and which were before held by an abbot, grants the manor, without the advowson, to a bishop, who re-grants both the manor and advowson to the king. A grant afterwards made by the king of the manor, with the appurtenances, naming the advowson, and describing the whole as formerly belonging to the abbot, and lately to the bishop, passes the advowson.

Upon *quare impedit* a special verdict was found, viz. that the king being seized in fee of the manor of Leyhorn, in the county of Kent, to which the advowson of the church of Leyhorn is appendant, (which manor came to him by the dissolution of the monasteries, having been part of the possessions of the abbot of Gray Church,) granted the manor to the Archbishop of Canterbury and his successors, saving the advowson; afterwards the church being void, the king presents J. S. The archbishop of Canterbury grants the manor and the advowson to the king, his heirs and successors, which grant is confirmed by the dean and chapter. The king grants the manor, with the appurtenances, and this advowson, (naming it in particular,) "which lately did belong to the archbishop of Canterbury, and to the abbot of Gray Church, together with all privileges, profits, commodities, &c. in as ample manner as they came to the king's hand by the grant of the archbishop, or by colour or pretence of any grant from the archbishop, or confirmation of the dean and chapter, or by surrender of the late abbot of Gray Church, or as amply as they are now, or at any time were, in our hands, to Sir Edward North and his heirs," &c. The question was, whether the *advowson* passed by this grant?

Per Cur. It is a well established rule, that where different constructions may be made of the king's grant, then, for the honour of the crown and the benefit of the subject, such construction ought to be made that the royal charter may take effect, as it is never the king's intent to make a void grant; and in like manner, if the king be misinformed, but not deceived, as if he grants a manor or advowson *adeo plene*, as he by any means had it *csidam archiepiscopo*, where the archbishop had the manor but not the advowson, it will be a good grant, for the general words *adeo plene*, as the king by any ways had it, are sufficient to pass the advowson. See 1 *Co.* 52. a; *Moor.* 318; *Co. Ent.* 384; *Hob.* 170; 11 *Co.* 90; 2 *Roll.* 186; 1 *Bulst.* 4; *Cro. Car.* 34; 1 *And.* 148; *Yelv.* 42; 3 *Leon.* 162; 10 *Hen.* 4. pl. 3. 29. *Edw.* 3. pl. 71. b.; 21 *Edw.* 4. pl. 49; 33 *Hen.* 7. pl. 6; 36 *Hen.* 8. pl. 1; 38 *Hen.* 6. pl. 37; 8. *Edw.* 4. pl. 11. 12; 2 *Co.* 54; *Dyer.* 350; 20 *Co.* 65. a; 2 *Inst.* 446; 3 *Hen.* 2. pl. 2; 1 *And.* 148; *Plowd.* 192; *Poph.* 60; 10 *Co.* 113; *Cro. Car.* 548; 6 *Co.* 7; *Cro. Jac.* 48; 8 *Co.* 167; *Co. Lit.* 121; 2 *Roll.* 125; *Moor.* 421; 2 *Ro. Ab.* 185; 1 *Ro. Rep.* 62; *Chitty, jun. on the Prerogatives of the Crown.*

REX. V. THE BISHOP OF DURHAM, THE CHANCELLOR, MASTER, AND SCHOLARS OF CAMBRIDGE, EDWARD FENWICK, JOHN WARD, AND EDWARD FENWICK, JUN. CLERK. M. T. 1720. C. P. 1 Comyn. 360.

Upon a *quare impedit*, in which the Attorney-General declared *quod Eliz. Regina seisit' de ecclesia de Simondbourne in Com' Northum' ut de uno grossa in jure coronas presentav' J. Hodges quodque advocatio descendebat Jaco-*

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be Primo, et qui super mortem J Hodges presentavit Cuthbert Ridley; and that from him it descended to King Charles the First, who, upon the death of Ridley, presented William Kember, and from him it descended to King Charles the Second; and upon the death of Kember, John Ripon, and Thomas Allgood, by usurpation, presented Majors Algood; that the advowson descended to King James the Second, and that, upon his abdication, to King William and Queen Mary; and that, upon the death of Allgood, the chancellor, masters, and scholars of Cambridge, by usurpation, presented William Stainforth; that afterwards the advowson descended to Queen Anne, and from her to his present Majesty King George, to whom, upon the death of Stainforth, the right of presentation appertained. The bishop pleaded that he claimed nothing but as ordinary. Edward Fenwick, sen. pleaded, that Queen Elizabeth was seised of the manor of Wark, to which the church of Symondbourne was appendant, and presented Hodges; and that the manor of *quod*, &c. descended to King James the First, who presented Ridley; and by letters patent dated the 11th January, in the 11th year of his reign, granted the said manor *cum pertin'* to Elizabeth Howard, wife of Theophilus Lord Howard, afterwards Earl of Suffolk, and her heirs; and that upon the death of Ridley, the Earl of Suffolk, in the right of his wife, presented Kember, and the manor descended to James Earl of Suffolk; who by indenture dated the 9th July, 1664, enrolled and bargained and sold to Sir Francis Radcliff, afterwards Earl of Derwentwater, in fee; who by deed dated the 4th September, 1665, granted the next avoidance to J. Ripon and Thomas Allgood; who, upon the death of Kember, presented M. Allgood; and that, by the statute 3 Ja. 1. cap. 5. the University shall present to the benefice of a recusant convict, and that the Earl of Derwentwater being a convict, upon the death of Allgood, the University presented William Stainforth; that the advowson descended to James Earl of Derwentwater, who by indenture dated the 15th of August, 12 Anne, granted the next avoidance to the defendant Edward Fenwick, sen. to whom the presentation, upon the death of Stainforth, belonged; &c. *absque hoc*, that Queen Elizabeth was seised in gross. Edward Fenwick, jun. pleaded that he claimed nothing but upon the presentation of Edward Fenwick, sen. The chancellor, masters, and scholars of the University of Cambridge pleaded, that Edward the Second was seised of the manor of Wark, *ad quod*, &c. that it descended to Edward the Third, who, by letters patent dated the 9th of May, 25 Edward 3. granted the advowson to the warden and college of the chapel of Windsor, and their successors, and so decreed the advowson to Queen Elizabeth, who presented Hodges; and upon his death King James the First presented Ridley, and having the manor of Wark also, he, by letters patent dated the 12th January, in the 11th year of his reign, granted *tot' il' castr' honor et maner' de Wark &c. ac omnes advocacion' &c. omnium et singular' ecclesiar' &c. infra Com' &c. in eodem Litt' Lat' specificat vel alibi præd' maner' &c. spectan' pertin' &c. aut ut memb' &c. unquam ante tunc habit' cognit' reputat' &c.* to Elizabeth, the wife of Theophilus Lord Waldon, heir apparent to the Earl of Suffolk, and her heirs, by which she was seised of the manor and of the advowson; and upon the death of Ridley presented Kember, and so derived the advowson to Edward Earl of Derwentwater, who being a recusant convict, the University, upon the death of Allgood, presented Stainforth, and then derived the advowson to James Earl of Derwentwater, an infant; and that, by the statute 12 Ann. sess. 2. cap. 14. every papist or person professing the popish religion, and every infant of such papist, not being a protestant, and every mortgagee, trustee, &c. of such, is disabled &c. and the University shall present, &c.; upon which the Earl of Derwentwater, not being a protestant, but the son of a papist, &c. the presentation belonged to the University, who presented the defendant Ward; *absque hoc*, that King James the First died seised of the advowson. The defendant Ward pleaded that he did not disturb, &c. To the pleas of the bishop, Edward Fenwick, jun. and Ward, the Attorney-General replied, and prayed judgment, with a *cessat' executio*, &c. To the plea of Edward Fenwick, sen. the Attorney-General demurred, and for not joining

The grant of a manor, with all advowsons, &c. thereunto attached, does not include an advowson severed in ancient times, notwithstanding it was appendant to the manor 300 years since.

in demurrer took judgment. To the University plea the Attorney-General demurred, and showed for cause that the traverse is not material, and that the defendant did not show any title to the advowson, and the University joined in demurrer. And it was argued, that by the letters patent, 11 Ja. 1. the advowson of Simondbourne did not pass, for it is not expressly named in the patent; and by the stat. 17 Edw. 2. *Procur. Regis. c. 15.* an advowson appendant does not pass by the grant of a manor *cum pertin'* if it be not expressly mentioned. And though it is admitted by the pleadings, that this advowson was appendant to the manor of Wark in the time of Edward the Second, and the grant by the letters patent is *intercal'* of the manor of Wark with all advowsons, &c. *pende' aut ut membr' parcel eorundum maner' &c. unquam ante hac habit' cognit' accept'; occupat' usitat' reputat' existen' &c.* These words cannot pass an advowson severed from the manor 300 years, though it was *ante tunc* appendant to the manor; and of that opinion was the court, therefore judgment was given for the King.

3. WOLFERSTAN V. THE BISHOP OF LINCOLN, AND WHITEHEAD. T. T. 1763. C. P. 2 Wils. 174; in error, 3 Burr. 1504; S. C. 1 Blac. 490.

The grant of the next presentation, or of an advowson made after the church is actually vacant, is a void grant *quoad* the fallen vacancy, but no lapse incurs till after induction to a second benefice.

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In *quare impedit* to permit the plaintiff, who was the grantee of the advowson in fee, to present the north mediety of the church of G. S. in the county of L. The declaration set forth for a grant of the advowson made to the plaintiff in fee by the persons seized of it, *viz.* on the 9th of November, 1759. It then set forth the statute of 21 Hen. 2. c. 13. s. 9. against pluralities, and stated the facts necessary to show his right to the action, *viz.* that G. S. is a rectory, a benefice with cure of souls, of above the yearly value of 8*l.*; that T. G. the incumbent, accepted and took another benefice, with cure of souls, *viz.* the living of S. and was instituted, admitted, and inducted in possession of the same; that thereupon the plaintiff presented J. H. to the rectory of G. S. who tendered himself to the bishop, and was refused. The bishop's plea admitted the incumbency of T. G. and his acceptance of the living of S. but supposed the avoidance of his former church to have been made by his institution to the second, on the 31st of October, 1759, as the plaintiff had before alleged; and then, by computing from the institution, showed that six months elapsed, whereupon he collated T. W. to it by elapse on the 20th of June, 1760. The replication specified the time of T. G.'s induction to S. to have been upon the 22d of December, 1659; and alleged that, upon the 20th of June, 1760, the day when the bishop collated his clerk, T. W. six months from the induction of T. G. to S. had not elapsed. The bishop's rejoinder insisted upon the lapse incurring at the end of six months from the time of T. G.'s institution to S. and traversed his refusal of J. H. before he himself had collated his own clerk, or that J. H. had tendered himself to him before he had collated the other, or within six months after the institution of T. G. to S. To this rejoinder the plaintiff demurred, both generally and specially, and the bishop joined in demurrer. The pleadings on the part of the incumbent were similar to those of the bishop. The chief question was, whether the church was void upon the institution to the second benefice or not before the induction to it, so as the bishop could collate without notice, for it was not void before induction; then the bishop had collated two days too soon. The case underwent several very elaborate arguments on this question, and also on an objection to the statement of the plaintiff's title, that it appeared from the day of the date of the grant in the count that the benefice was vacant when the grant was made, and that the plaintiff had no right to present. *Per Cur.* We are of opinion that the day of the date of the deed of grant in the count coming under *videlicet*, and never having been taken notice of again in any part of the pleadings, is totally immaterial, and that the plaintiff has shown a good title. We are also of opinion, that the church was so void upon institution to the second living, that the patron might present immediately thereupon if he pleased, but that the bishop had no right to collate by lapse without notice given him; therefore judgment must be entered for the plaintiff. Upon a writ of error brought upon the above judgment, *Per Cur.* The lapse on the avoidance of the former benefice does not take place till induction to

the second; we are clear that a grant of a next presentation, or of an advowson made after the church is actually fallen vacant, is a void grant *quod* the fallen vacancy; but that the fact is not sufficiently ascertained upon these pleadings; for though it appears clear "that the grant was made on the 9th Nov. 1759, still it does not appear at what time T. G. was instituted to the second benefice;" consequently the objection cannot be let in "that it was vacant when the grant was made." It is no where averred "that the grant was subsequent to the avoidance," nor is there any thing that appears upon the pleadings sufficient to support the objection. Judgment affirmed. Afterwards it was attempted to be shown, that if an improper time be alleged where the precise time is the gist of the action, the day under the *scilicet* is material; but *Per Cur.* We are still of opinion that this objection can not be got at under these pleadings, for all the pleadings are bad, except the plaintiff's declaration. The whole stands, therefore, upon the declaration, which states the conveyance of the right to the plaintiff to present to be by a grant made on the 9th of Nov. and upon the face of it shows a good title in the plaintiff to present, which stands alone and unanswered. The plea, indeed, is intended to raise the question, whether six months should be computed from the institution or from the induction. But the plea, and likewise the rejoinder, are both out of the case, for each of them is bad; there is a total end of them to every intent and purpose whatsoever. You cannot, therefore, extract from them a fact to destroy the plaintiff's title; for they are nullities, and just as much so as if they had never been pleaded at all. Judgment affirmed.

4. GOODYER ST. JOHN, ESQ. V. LORD BISHOP OF WINCHESTER AND ROBERT HILL, CLERK. M. T. 1773. C. P. 2 Bl. Rep. 930.

On the 13th June, 1763, Sir T. G. in consideration of 10,000*l.* articulated Qu. whether a devise of all the advowsons for the purchase of which S. have contracted, with directions for completing such contracts (the testator being then under contract for the purchase of one advowson) will pass an advowson formerly purchased before the making of the will. to convey to Sir B. B. and his heirs, on or before the 25th of March, 1764, the manor of U. C. with the lands, tenements, hereditaments, and appurtenances, and certain other lands, all in the county of H. On the 30th of October, 1762, the Hon. T. P. in consideration of 7000*l.* paid, and 7000*l.* to be paid, covenanted to convey to the said Sir B. B. and his heirs, on or before the 25th of March, 1764, the manor of A. &c. in the county of H. and the advowson of the rectory of A. aforesaid. On the 10th of February, 1764, T. F. and others, in consideration of 2500*l.* conveyed to the said Sir B. B. and his heirs, the advowson of M. now in question, in the county of H. Sir B. B. being thus seised in fee of this advowson of M. and entitled in equity to the estates of U. C. and A. and with the advowson thereof, the articles not being then carried into execution, and being seised of other estates in the counties of Stafford, Suffolk, Salop, and Chester, on some of which a rent charge of 1000*l.* per annum was settled on M. his wife, for her jointure; and being also seised of a real estate in L. which on the 10th of November, 1763, he had articulated to sell to G. F. T. Esq. for 2700*l.* he on the 21st May, 1764, by his last will, duly executed, devised to his wife and her heirs, &c. his house in Brook-street, all his stock in the public funds, jewels, linen, pictures, china, plate, and furniture. He also gave to his said wife and her heirs all the manors, messuages, advowsons, farms, &c. in the county of Hants, for the purchase of which he had already contracted and agreed; or, in lieu thereof, the whole money arising from the sale of his estate in L. and such further sum as might be necessary to complete the said contracts in truth, nevertheless to complete such purchases, and to take conveyances to her and their own use and benefit. He also gave to trustees and their heirs all his manors, messuages, advowsons, farms, &c. in the counties of Stafford and Chester, to the use of his brother T. D. for life, with remainder to his issue, in strict settlement, and divers remainders over; and after several pecuniary legacies, made his said brother residuary legatee of all his personal estate. *Per Cur.* We are unanimously of opinion that this advowson of M. did not pass by Sir B. B.'s will, but descended to his heir at law. The testator speaks only of those estates in H. which were under contract, not those of which the will was completed. He gives directions for finishing those contracts, and if never finished, he gives in lieu of them the money to arise from the sale of his

L. estate. 2700*l.* which exactly tallies with the sums which remained to be paid for completing his Hampshire contracts, viz. 10,000*l.* and 17,000*l.*; and though it is objected that, in order to satisfy the word advowsons in the plural number, this advowson must pass, for otherwise the testator had only one advowson in H. these seem to be general words thrown in by the drawer of the will, and can only convey what the testator confines it to, those which he was then under contract for. And we have founded this opinion because the same expression was used by him with regard to his other estates in Cheshire and Staffordshire, where he had only an advowson, and hardly so much, being only a nominative to a chapel. Judgment for the defendant. *See post, tit. Devise.*

5. BARRET AND ANOTHER V. GLURB AND ANOTHER. H. T. 1776. C. P. 2Blac. 1052.

Although a grant of an advowson made after the church has actually fallen vacant is void *quoad* the fallen vacancy, yet it is good as to the advowson itself, unless it be a corrupt purchase.

This was a case sent out of chancery on a question whether the presentation was void, as being on a simoniacal contract? The facts stated were, that the plaintiff, having notice that C. M. clerk, then incumbent of the rectory of H. in the county of S. which is a rectory with cure of souls, was on his death-bed, and that it was uncertain whether he would live over the night, purchased the advowson of the defendant. The incumbent died the next day, and the purchaser presented the plaintiff as his clerk upon that avoidance. The question was, whether the said presentation was void, as being on a simoniacal contract? *Per Cur.* An advowson is a temporal right, not, indeed, *jus habendi*, but *jus disponendi*. The exercise of that right is by presentation; the right itself is a valuable right, and therefore an advowson is held to be assets in case of lineal warranty; it is real assets also in the hands of the heir; and the trustee or mortgagee of an advowson are bound to present the clerk of the *cestui que* trust for the mortgagor.* Thus far it is a valuable right, and properly the object of sale. But the exercise of this right is a public trust, and therefore ought to be void of any pecuniary consideration either in patron or presentee. It cannot, it ought not to produce any profit; it is not vested in guardian *in socage*, nor is he accountable for any presentation made during the infancy of his ward. It has been holden, that an advowson will not pass by the words commodities, emoluments, profits, and advantages; and in *quare impedit* the patron could not, at common law, recover damages. [313] Simony as such was unknown to the common law, though corrupt presentation was; but what is or is not simony now depends on the statute of the 31st Eliz. c. 6. which did not adopt all the wild notions of the canon law, but has defined it to be a corrupt agreement to present. Now no conveyance of an advowson can be affected by this act, unless so far as it affects the immediate presentation; and therefore a sale of an advowson, the church being actually vacant, is simoniacal, and void in respect to the present vacancy. But it has never been thought that the purchase of an advowson, merely with a prospect, however probable, that the church would soon become void, was either corrupt or simoniacal, though by common law, if a clerk, or a stranger with the privity of the clerk, contracts for the next avoidance, the incumbent being *in extremis*, it has been holden to be simoniacal. The present case was the purchase of an advowson in fee, and no privity of clerk appears. The church was not actually void, but in great probability of being so, which, however, was by no means equivalent to a certainty. We should therefore go beyond every resolution of our predecessors to determine this to be simony; for suppose this had been the purchase of a manor with an advowson ap-

* The general rule is, that there may be an equitable owner of an advowson, as *cestui que* trust, or purchaser before conveyance; but a trustee or mortgagee will only have the bare right of presentation, and not of nomination. *Galley v. Selby*, 1 Com. Rep. 343; S. C. 1 Stra. 403; and authorities cited *Mirehouse*. 59. Where a person mortgages an advowson, although the legal right to present is transferred to the mortgagee, yet he cannot present, even if the church becomes vacant pending in a suit to foreclose. Thus, where a person having mortgaged a manor, to which an advowson was appendant, to a plaintiff who filed a bill to foreclose, the Court granted an injunction to stay proceedings in a suit brought by the mortgagee relative to the presentment, stating, that as the mortgagee can make no profit by presenting to the church, nor account for any value in respect thereof to sink or lessen his debt; until foreclosure, he is but in the nature of the trustee for the mortgagor. See 2 Vern. 401, 549; 2 P. Wms. 404; Atk. 558; Bunb. 130.

pendant, and the incumbent being in *extremis*, what must be done, if the present case be simony? Must we have declared the appendancy to be severed, or that the whole manor was purchased corruptly for the sake of the advowson? The court certified their opinion that the presentation was not void, it not appearing to them to have been made upon a simoniacal contract. See *Cro. Car.* 425; 1 *Rol. Ab.* 523-4; 3 *Lev.* 116; *Skin.* 90; *Burr.* 1510; *Hob.* 165; *Moor.* 916; *Winch.* 63.

6. BENNET COLLEGE, CAMBRIDGE, V. THE BISHOP OF LONDON, AND CALVERT, WIDOW. H. T. 1778. C. P. 2 Blac. 1182.

In *quare impedit* for the church of L. in E. the plaintiff declared upon the devise of Thomas Tooke, D. D. who, on the 7th of December, 1717, by will devised the advowson to John Tooke for 50 years from his, the testator's decease, which happened on the 2d of April, 1721, and after the expiration of that term to the masters and fellows of Bennet College, and their successors for ever. The principal objection was, that the college could not take any legal estate by this devise, because all devises to corporations are excepted out of the statute of wills. See 34 & 35 Hen. 8. c. 5. *Per Cur.* A devise to a college is good by way of charitable use, and that not merely in equity by way of appointment of uses, but also at law; for the statute of 48 Eliz. c. 4. was *pro tanto* a repeal of the exception in the statute of 35 Hen. 8. c. 5. and therefore any devise to a college in either of the Universities is good, and will convey to them a legal title. Judgment for the plaintiff. See 43 *Eliz.* c. 4.

7. REPINGTON V. THE GOVERNOR OF TAMWORTH SCHOOL. E. T. 1763. C. [314] P. 2 Wils. 150.

A. B. being seised of the advowson of a donative, the church in his lifetime becomes void; then A. B. dies (the church being still void) having first made his will; the plaintiff, his executor brought a *quare impedit*, supposing himself entitled to his turn as an executor in the case of a presentative benefice; after two arguments, the court was clearly of opinion that the right of donation descended to the heir of A. B. and that his executor had no title, which he would have had if it had been a presentative benefice. It was said by the court, in giving this judgment, that before the Council of Lateran, all benefices were like what donatives are now; that no lapse could have incurred in ancient times; and that bishops had no right of institution before the time of Richard 2. *ante concilium Lateranense*, (says Bracton,) *nullum curriebat tempus contra presentantes*, Seld. Hist. Tithes, cap. 12. fo. 380; and the chief justice said, the author of the Codex never read this chapter of Seldon, or he has imposed upon the public; he said, there is no case in the books to exclude the heir of a donative from his turn in this case; that a patron of a donative can never be put out of possession by an usurpation. See *Bolton v. Ward*, 2 *Rol. Rep.* 100.

8. ARTHINGTON AND HARDCASTLE V. THE BISHOP OF CHESTER, AND JACKSON, E. T. 1790. C. P. 1 H. B. 418.

On the trial of a *quare impedit*, a verdict was found for the plaintiff, subject to the opinion of the Court, upon the following case:—In the reign of Hen. 3. the rectory of C. was appropriated to the abbey of C. and from that time to the time of the dissolution of the abbey the parish of C. was served either by some of the monks, or by some person whom they employed, there not appearing ever to have been a vicarage endowed. After the dissolution of religious houses, the abbey of C. was demised by Ed. 6. to one W. for 21 years; and in the grant, after the demise of the rectory, there was an exception of all woods and underwoods, and a demise of the advowson of the vicarage of the church of C. The reversion expectant on that term for years was sold by Queen Elizabeth to A. and F. The letters patent of Elizabeth began by reciting the former demise, and then the Queen granted the reversion of the rectory, with the appurtenances, as before specified in the patent, and the demise for years; after this there was a grant of the whole rectory, with a very ample description, containing all the general words of grant, which concluded with granting it to A. and F. in as full a manner as it was

A devise of an advowson to a college in the University is valid.

In donatives the right of donation descends to the heir at law where a vacancy has occurred in the life-time of the executor.

An exception in a crown grant of a rectory of all "churches and vicarages theretobelonging," does not include a perpetual curacy.

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possessed by any abbot of C. It then mentioned a grant of the rectory of I. in the county of S.; and at the close there was an exception of all advowsons of the rectories, vicarages, and churches, belonging to the parishes. The case then stated that there was a vicarage belonging to the rectory of I. but none to the rectory of C. but states the time the rectory of C. remained in the crown; an annual stipend of 5*l.* 6*s.* 8*d.* was paid by the crown to the curate. J. D. was admitted to the curacy in 1642, on the nomination of the grantees. In 1661, one O. was licensed to serve the curacy. Afterwards one T. was licensed in the same manner; and that T. in 1708, was instituted to the rectory and vicarage of C. on the presentation of Queen Anne, by lapse. In 1727, on the supposed death of T. one H. D. was instituted to the vicarage of C. on the presentation of King George 2.^d patron *pleno jure*. T. afterwards appeared and claimed the church, upon which D. gave it up. In 1737, one L. was nominated to the curacy by the impropiators, while T. was in possession. By a process in the Consistory Court of Chester, T. was dispossessed; and in 1739, L. was licensed to the curacy of C. which he enjoyed till his death, in 1789; and by the death of L. there was an avoidance. The question for the determination of the Court was, what passed by the grant of Queen Elizabeth to the persons under whom the present parties claim. *Per Cur.* On a view of the grant together with the facts of the case, there is no reason to say that the curacy was excepted. The grant of Eliz. begins with a recital of the demise to W.; but it would not be just to conclude that it meant to give no more; for it is manifest that W. had not all which the grantees afterwards had, because there is an express reservation in the demise to him of a part which they enjoyed; he was to have the profits of the rectory, paying a rent of 20*l.* *per annum* during the term; but the transaction with A. and F. was for an absolute sale. The grant does not stop short; it was necessary to recite the term because it was a grant in fee, and the purchaser under the crown acquired a right, during the remainder of the term, to the rent. It, therefore, begins with giving to the grantees, the reversion after the term for years, and goes on in explicit and distinct words, granting this and all other commodities and emoluments whatever, belonging to the rectory, parcel of the possessions of the abbot of C. It mentions expressly the words, underwoods, and trees and closes, a very long recital of the particulars, with the words, in as ample a manner and form as any abbot of the abbey of C. had possessed and enjoyed the same. The general exception which follows was to prevent dilapidations which were at that time very common to the destruction of churches. In the exception of the vicarage it is perfectly clear that the nomination of the curacy is not in terms included; the words in the grant are general, and sufficiently answered if there be a vicarage belonging to either of the livings. Now to one of the livings, *viz.* I. there is a vicarage belonging that fully satisfies the words of the exception; they are not nugatory, nor is it necessary in the construction of them that there should be an intention in the grant, which go pretty far to show that this could not be the intention; for there is a provision on the part of the crown to indemnify the purchasers from all burdens, charges, and rents, which might be issuing out of the object of the grant and a particular exemption from the payment of a pension of 4*s.* *per annum*, payable out of the rectory of I. to the vicar. Now the nomination to that vicarage being intended to be reserved for the crown in the general mention which is made of all burthens issuing out of the things granted; the payment of this annual stipend to the vicar of I. is particularly noticed; but there is no exemption from the payment of any allowance to be made to the curate. The effect, therefore, of the grant would be, according to the argument, to make the grantee of the rectory subject in law to the payment of the curate, without giving him the power of nomination; and we should intend a reservation securing the nomination to the curacy from the fund out of which the provision for the curate must come. This would certainly be contrary to good policy, and productive of mischief, by making it questionable who was to maintain the curate, and leaving the Ecclesiastical Court destitute of the means to compel such

maintenance by sequestering the profits of the living; the curate also would be left without having any resort to the person by whom he was nominated for a provision for his subsistence. It is too much therefore to contend, without special words, that a reservation should be made by intendment out of the general words of the grant, when there is no part of the subject matter, nor any thing in the nature of the case, which would tend to induce such an intendment; and when both reason and policy are against it. The usage it was said stands very loosely on behalf of the impropiators, but it is certainly in their favour. The first nomination of which there is an account was made by the impropiators; how the next person was appointed does not appear. The nomination of I. which followed, and which is the first exercise of the right of the crown, is stated to have been by lapse, from which it is to be presumed that the crown had no original right to nominate. The next presentation of D. is still less in favour of the right of the crown, because it was clearly made on complete misinformation: there was no vacancy, no avoidance, and I. had still the title to the living; it must have been made on a supposition either that he was dead, or that there was an avoidance by some other means. It was a presentation granted by the crown in a case which neither entitled the crown nor any one else. I. appeared, and D. gave up the church to him, and he resumed the possession; the impropiators nominated L.; and on a suit in the Consistory Court, the Bishop of Chester affirmed their right to nominate, and I. was in consequence dispossessed, which could not have happened if the right had been in the crown; therefore the right of nomination of this curacy is in favour of the plaintiffs. Judgment for plaintiffs *See 2 Rol. Abr. 341; Plowd. 495; 1 Burn E. L. 71; Banb. 21; Co. Lit. 119. b; F. N. B. 76; 40 Co. 105. b; 2 Mod. 1.*

9. *CALLAND v. TROWARD.* T. T. 1795. C. P. 2 H. Black. 324; S. C. in error, 6 T. R. 439; S. C. Dom. Proc. 6 T. R. 778.

In covenant, the declaration stated, that by a certain indenture, the defendant, in consideration of 7000*l.* granted, bargained, and sold unto the plaintiff in fee, the advowson, donation, free disposition, and right of patronage and presentation, in and to the rectory of B. in the county of S. of which the reverend M. K. was then incumbent; and by the same indenture, the said defendant covenanted that he was seised of the said advowson in fee, without any manner of condition, contingent proviso, power of revocation, limitation, use or trust, or other matter, restraint, cause, or thing whatsoever, to alter, change, charge, revoke, defeat, determine, or make void the same; and further, that he had good right, full power, and lawful authority to bargain and sell; and that the said advowson were free from all charges and incumbrances whatsoever. It was then averred, that before the making of said indenture, Sir K. C. was seised of the advowson as of fee; and the church being then full of one J. T. clerk, the then incumbent thereof, the said K. C. by a deed poll granted unto M. K. the next presentation of the said advowson. That the said J. T. and the said M. K. being so entitled, the said J. T. was afterwards created Bishop of Rochester, whereby the king, by virtue of his prerogative, became entitled to present, and accordingly did present the said M. K. his clerk, to the said vacant church, who was duly instituted and inducted, and still is incumbent; and the said church being so full of the said last-mentioned M. K. the incumbent thereof, the said M. K. before the making of the said indenture, did by a certain indenture under seal, grant and assign unto the said M. K. the incumbent, the said next presentation; by virtue whereof, the said last-mentioned M. K. became and is possessed and entitled to the next presentation, contrary to the form and effect of the said indenture, and of the said covenant of the said defendant in that behalf, and so, &c. assigning the breach in the usual form. To this declaration there was a general demurrer.

Per Cur. The tenability of this demurrer depends upon the question, whether the grant of the next presentation, donation, and free disposition of the rectory of B. is either satisfied or disappointed by the next presentation, happening to be a prerogative presentation on an avoidance, in consequence of the incumbent being made a bishop. It is said that the grant being of the

The royal prerogative of presenting to a church vacant by the incumbent being promoted to a bishopric does not destroy the effect of a prior grant of the next presentation by the owner of the advowson.

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next presentation, the grantee can take nothing but the next presentation; and consequently, if he cannot take that, he can take nothing. The whole title being by law subject to a prerogative presentation, paramount, or rather collateral, to it, which suspends the effect of it, and prevents it from being productive for a time, and which is founded on the general law of the land, of which all take notice, and by which all are bound; could this prerogative presentation have been in the contemplation of the parties to this contract, unless for the purpose of being tacitly excepted out of it? And shall the general law of the land, contrary to one of its most established maxims, *lex nemini facit injuriam*, work to the prejudice of the grantee, by a strict and literal exposition of the words of the grant: grant imports covenant; and shall the grantor be construed to have contracted and bound himself to do that which by no possibility he could do, to grant that which by no possibility he could have to grant; and which both parties knew at the time of the grant, that by no possibility he could have? A man may certainly take upon himself to grant that interest which is not in him, which he has not to grant; but ordinarily it will be an interest of such a nature that by possibility he might have it. If a man has not in him, in point of title, the thing which he grants, it is apparent that his grant cannot take effect; the fallacy of the argument is in the application of this doctrine to the case of a prerogative presentation intervening, which ought not to be considered as a presentation by an elder title, but as arising out of a prerogative right collateral to the title, operating not to defeat, but to suspend, the title, leaving every thing derived out of the title, or in any manner connected with it, *in statu quo*. The king presents not by reason of title to the advowson, but *ratione prerogative sue*. If we inquire into the effect of a prerogative presentation, upon the title of the advowson, independent of the question of construction of the grant of the next presentation, with which it is entangled in this case, we shall find that a prerogative presentation to a church of which the advowson is in common, has not in practice passed for the turn of the otherwise rightful patron. We all remember the case of the Grocer's Company v. the Archbishop of Canterbury, 2 Black. 770. The point was solemnly adjudged. In that case all the principles which govern this case, except as to the construction of the grant, are recognized; therefore judgment for the plaintiff. To reverse the above judgment of the Court of Common Pleas, a writ of error was brought in K. B. and the case was argued there; after which the Court unanimously affirmed the judgment of the Common Pleas, being of opinion that this was a grant for what the law calls a valuable consideration; and it was not intended that the deed should be frustrated by the prerogative of the crown interfering. Upon which a writ of error was brought in the House of Lords; but their lordships affirmed the judgment given in the Common Pleas and King's Bench. See 1 Bulst. 26; W. Jones. 158; Co. Lit. 378; Winch. 94; 7 Co. 28; Cro. Jac. 691; 4 Mod. 266; 8 Co. 145; 1 Show. 441; Salk. 540; 1 Ld. Raym. 23; 3 Lev. 382; Dyer. 356; Fitz. 247; 2 Stra. 925; 3 Wils. 214; Co. Lit. 478.

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Advowsons in gross, with one acre of land, may pass by common recovery on a writ of entry *sur disseisin in le post*.

During a vacancy the grant of an advowson, not the next presentation is valid.

10. BAYLEY v. THE UNIVERSITY OF OXFORD. E. T. 1760. C. P. 2 Wils. 116.

The question was, whether a common recovery, which had been suffered of an advowson in gross, and one acre of land, upon a writ of entry *sur disseisin*, was good. Upon searching for precedents, sixteen were found, where recoveries of advowsons in gross, and a little land, had been suffered upon writs of entry *sur disseisin*, and no case was found where such a recovery was ever held bad. And Dörner's case, stated in 18 Vin. 218. side note to pl. 3. was said to be in point. The Court refused to hear any argument against the recovery, but said that, if this were *res integra*, perhaps it might not be right, yet *quod fieri non debuit factum valet*; and gave judgment for the plaintiff without argument.

11. HOLT v. THE BISHOP OF EXETER. T. T. 1809. C. P. 2 Taunt. 69.

The pleadings in this case raised the question whether the vacancy of a living vitiates a grant of the advowson, exclusive of the then vacant turr. The point was not argued or noticed by the Court. See *Skin*. 90; 3 *Lev*. 156; 3 *Burr*. 1511; 2 *Bl. Rep*. 1055.

V. OF APPROPRIATIONS.

1. 3 Salk. 43.

An appropriation of an advowson, church, glebe, tithe, &c. must be to some body politic or corporation; and when it was made by the patron or first founder, the form was thus: *Ego H. K. de H. concessi ecclesiam et ad vocationem meam de H. cum terris, &c. decimis omnibus ad eam pertinentibus abbati de S. &c.* so that not only the advowson and profits of the church, but the incumbency itself, which is a spiritual thing, vested in the appropriator. At common law an appropriation could not be made to a body politic or to a corporation, for a natural person is not capable of it, because he cannot be perpetual, and an appropriation makes an incumbent perpetual. And at common law it could not be made to a lay person; for as he could not be an incumbent by a presentation, so he shall not by an appropriation, which is but a more lasting incumbency. [319] These appropriations at first were made to abbots, deans, and sole corporations, who might administer sacramentals and had cure of souls; but afterwards, by dispensations, they were made to spiritual corporations aggregate, who had no cure of souls, as to deans and chapters, and at last to nuns, under pretence of hospitality. *Grand nefas*, as Dyer calls it. An appropriation cannot be granted over, for it is an incumbency, which is a spiritual thing; it is included in the spiritual function, which, being of the highest trust, cannot be transferred. It cannot be made without the patron, for his advowson being a lay inheritance, cannot be divested without his consent; neither can it be made without the consent or concurrence of the king, because the advowson itself is held of him mediately or immediately, and he shall not lose his possibility of escheap or lapse without his consent; but an appropriation may be made by the patron and the king, acting as supreme ordinary, without the bishop; and the reason is, because, before the reformation, it might have been made by the king, by the patron, and the pope, and whatever the pope might have done is now vested in the king, by the statute of Henry 8. See *Plow.* 496. 497; 1 *Bl. Com.* 384; 1 *Burn. Ecc. L.* 66; *Doctor and Student*, 312; *Gibs. Ev. ch.* 13. 75. n; *Degge Pl. part 1. ch.* 13. 195. 199; *F. N. B.* 223; *Hob.* 149; 10 *Co. Rep.* 11; 1 *Rol. Ab.* 239; *Wats. Cl. L. ch.* 17. 189. 195; 2 *Vin. Lect.* 87; 1 *Com. Dig. tit. Advowson, D.* 1; 1 *Haggard, Rep.* 163.

2. BRAZEN-NOSE COLLEGE V. THE BISHOP OF SALISBURY, AND E. OUTRAM, D.

D. E. T. 1813. C. P. 4 Taunt. 831.

This was a special case, which stated that the rectory of St. P. was created by the statute of 7 Anne, and that that act ordained, for the better livelihood and maintaining of the rector, the prebend of Sawley, in the Cathedral church of Litchfield, whenever it shall be conferred by the bishop for the time being on such person as shall then be rector of the said new church, and that the bishop shall collate him to it, and possession shall be given of it in such form and manner as is usual, and under such conditions as the statutes of the said cathedral church shall require, to have and to hold the same, so long as he shall continue rector of the said new church in Birmingham, and no longer; and whenever, by his death or by any other means, that church shall become void, the prebend shall remain united and annexed to the rectory for ever, that is to say, the succeeding rector shall be collated to the prebend, and installed into it, as usual, under the obligation of all duties, burdens, and charges, to which the prebend is or may hereafter be subjected by the statutes of the cathedral church. Provided, nevertheless, and it was thereby declared, that nothing in that act contained should in any sort extend to alter the estate or interest of the present prebendary of Sawley in the prebend, but that he might let any lease or leases, as theretofore had been usual. Provided, and it was enacted, that all the rectors of the parish church of St. Philip should be presented, collated, instituted, and inducted as other rectors, parsons, and

A statute creating a rectory by directing that a prebend shall be given to the rector, and on his vacating shall remain united and annexed to the rectory for ever, does not make the rectory an appropriate benefice within the stat.

31 H. 8. c.

13. s. 31.*

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* This act provides, that no deanery, archdeaconry, chancellorship, treasureship, chanter'ship, or prebend in any cathedral or collegiate church, nor parsonage that hath a vicar endued, nor any benefice perpetually appropriate, be taken or comprehended under the name of benefice, having cure of souls, in any article afore specified.

vicars, are accustomed to be. In 1797, a private act of parliament was passed, entitled "An Act to explain and amend an Act passed in the 4th and 5th Years of the Reign of her late Majesty Queen Anne, entitled, 'An act for augmenting the Number of Canons Residentiary in the Cathedral Church of Litchfield, and for improving the Deanery and Prebends of the said Cathedral, and to make further Provisions for the Canons Residentiary in the said Cathedral Church, and an Addition to the Fabric Fund thereof,'" wherein it was enacted that the Bishop of Litchfield and Coventry for the time being should, as often as avoidances or vacancies should happen, after the passing of that act, admit and collate clerks duly qualified to all the six residentiaryships, and the canons residentiary so admitted and collated should be thereupon installed, without any election in consequence of such admission and collation, and become canons residentiary of the said cathedral church, and members of the chapter of deans and canons residentiary of the same church, to all intents and purposes whatsoever. The question was, whether these statutes did not render the rectory an appropriation to the prebend, so as to constitute an appropriate benefice within the statute 21 H. 8. c. 13. s. 31.

Per Cur. As the act of parliament directs that the prebend of Sawley shall be conferred by the Bishop of Litchfield for the time being on such person as shall then be rector of the said church, that the bishop shall collate him to it in such form and manner as is usual, and under such conditions as the statutes of the cathedral church require, to have and to hold the same so long as he shall continue rector of said new church in Birmingham, and no longer; and when by his decease, or any other means, the said church shall become void, and the said prebend shall remain united and annexed to the said rectory for ever. It is impossible to contend, in opposition to this plain intelligible language, that the rectory is not annexed to the prebend, but the prebend to the rectory. The act then proceeds to state, that the succeeding rector shall be collated to the prebend according to the rules of the cathedral church. What? collated to the prebend when the prebend is annexed to the living? He is to be collated; this would be unnecessary, if he has a right to it by reason of his character of rector. So far, then, it is clear the rector of St. Philip's could not become the rector but by the cause of collation or presentation, institution and induction; and when he has obtained that, he has a right to call on the bishop to collate him to this prebend of Sawley.

VI. OF UNIONS.*

1. *HARMAN v. RENEW.* M. T. 1694. K. B. 1 Salk. 165. S. P. *REYNOLDSON v. BLAKE.* E. T. 1696. K. B. 1 Ld. Raym. 192.

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The union
of church-
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law.

On a motion for a prohibition to the Consistory Court of London, on the statute 22 Car. 2. c. 11 which united the parish of St. M. B. to the parish of

* The law respecting the union of churches is principally founded upon, and regulated by, the statutes 37 H. 8. c. 21; 17 Car. 2. c. 3; and 4 & 5 W. & M. c. 12. The following analysis of these provisions may be useful:—An union of two churches, or of a church and chapel in one, the one of them not being above the yearly value of 6*l.* as valued to H. M. in the first fruits, and not distant from the other above one mile, may be had by the assent of the ordinary, incumbents, and of all such as have the patronages being of full age, to continue for ever as by writing under their seals declared; 37 Hen. 8. c. 21. s. 6. All unions heretofore made by the like assent in fee-simple shall also continue for ever; id. s. 4; saving unto H. M. all tenths and first fruits; id. s. 5. But all unions had within any city or town corporate without assent of the mayor, sheriffs, and commonalty of the city, or of such bodies corporate of other towns, by the names under their common seal shall be void; id. s. 6. Where the inhabitants of any parish, or a majority of them, in one year after the union shall by writing assure the incumbent of the yearly payment of as much money as with their first fruits shall amount to 8*l.* such unions shall be void; id. s. 7. In every city or town corporate, having a mayor and aldermen, and particular justices of the peace, or bailiffs, or other chief officers and assistants, by charter, in which two or more churches and chapels lie convenient to be united, the bishop, with consent of the chief officers, or a majority of them, and of the patrons, may unite the churches, &c. and shall appoint at which church the inhabitants shall meet, which shall be the church or chapel presentative thereafter, and shall be resorted to as the proper church, and the parishioners of the united parishes shall pay tithes to the incumbent thereof; 17 C. 2. c. 3. s. 1. Notwithstanding such union, each parish shall continue distinct as to all rates and privileges, and churchwardens shall be elected for each; id. s. 2. Where one or more of the churches is full, the union shall take effect upon the first avoidance, and the patrons

H. S. against the parishioners of the parish of St. M. B. to have contribution to the repair of the church of St. S. Holt, C. J. said, that at common law, [522] by the concurrence of parson, patron, and ordinary, churches might be united to one another, but not parishes. And Powell, J. observed, that union was of spiritual conusance till 37 Hen. 8, c. 21; and that since this act the spiritual court had exercised jurisdiction over it. See *Austyn v. Twyne*, Cro. Eliz. 500.

2. *REYNOLDSON v. BLAKE*, E. T. 1696, K. B. 1 Ld, Raym. 196. S. P. *KING v. THE ARCHBISHOP OF ARMAGH*, 1 Stra. 519.

In this case it was said *Per Cur.* that unions were generally made in time of vacancy of the church; for if the church was full, the act of the ordinary could not prejudice the incumbent; for by the union, the incumbency would be destroyed; therefore if the church was full, the consent of the incumbent was necessary. But if the church was full, and the incumbent would not consent, the union could not be made *de verbis in presenti*, but it might be made *de verbis in futuro*; *quando vacaverit*, &c. 6 H. 7, 14. "And after the union the ordinary might compel the parishioners to come to the church to which the union was made; and to pay their tithes by process in this court, and no prohibition was grantable. And this was no prejudice to the parishioners, because their *modus* continued good; but the parish, as to taxes, duties, rates, reparations of the church, &c. continued distinct. See 2 Rol. Ab. 357; *Degge*, P. C. ch. 14, 205.

3. *FELLDOWN v. BEALE*, E. T. 1691, K. B. Carth. 238.

Upon a declaration in a prohibition and a demurrer thereto; it appeared that the parish churches of St. M. and St. M. K. in the city of W. were united *concurrentibus hiis*, by the statute 17 Char. 2, c. 3, and the church of St. M. appointed to be the presentative church; afterwards the parish church of St. M. K. was demolished, and houses built on its scite. The plaintiff was an inhabitant within the limits of the old parish of St. M. K. and not within the boundaries of St. M. and now the question was raised under a libel instituted against the plaintiff, in the Consistory Court of Winchester, for refusing to contribute to the repairs of the church of St. M. whether this union of churches was such an union of parishes, so as to make those who were inhabitants within the limits of St. M. K. and without the bounds of St. M. chargeable and contributable to the repairs of the church of St. M. It was argued for the plaintiff that an union of churches intended no more at common law, than a consolidation of tithes; but that the bounds thereof continued districts as before the union; for an union is always with respect to and for the benefit of the parson, and not to confound the distinction of parishes; but that they shall remain separate to all purposes, notwithstanding the union; and besides it is provided by the statute 17 Char. 2, that the parishes shall remain separate. On the other side it was contended, that the proviso in the statute 17 Char. 2, must be construed to extend only to cases where both shall present by turns in order, as the bishop, with consent of the mayor, &c. (as in s. 1.) and of the patrons, shall determine, saving all tenths and first fruits, procurations, and pension; 17 C. 2, c. 3, s. 3. No union made under this act shall be effectual till registered in the register book of the bishop; id. s. 4. Nor, where the settled maintenance of the incumbent exceeds 100*l.* per annum, unless the majority of parishioners under their hands desire otherwise; id. s. 5. Every minister of churches united according to this act shall be incumbent thereof, so as he be a graduate in an university of this kingdom; id. s. 6. Every owner of impropriations or tithes may annex the same to the parsonage or vicarage of the parish church where the same lie, or settle them in trust for the parsonage, &c. or the curates there successively, where it is impropriate, and no vicar endowed without licence of mortmain; id. s. 7. If the maintenance of any parsonage or vicarage with cure shall not be 100*l.* per ann. the incumbent may purchase to him and his successors, lands, rents, tithes, or other hereditaments, without licence of mortmain; id. s. 8. Where any churches are united under 17 C. 2, c. 3, and one of them is demolished, then, as often as the church presentative is out of repair, or needs decent ornaments for performance of divine service, the parishioners of the parish whose church has been demolished shall pay towards the charges thereof such proportion as the bishop shall by the union direct, and for want of such direction, one-third part of them shall be rated; and in default thereof the same may be recovered against them as if it were for the repair of their own parish church; 4 & 5 W. & M. c. 12, s. 2.

Though one church is united to another, this does not unite the parishes. But it is only an appropriation of [323] one church to the other so that the incumbent and his successors of the other church shall be parsons of the church united. Where two churches are united by act of parliament after the next avoidance of both, the patron cannot present to the united vicarage upon the next avoidance of one.*

churches remain, and are in being after the union; and if so, then it is not reasonable that the parishioners of the one church should contribute to the repairs of the other church, because they are chargeable to the repairs of their own. But the court inclined to continue the prohibitions for the reasons *supra*. See 1 Salk. 165; Skin. Rep. 588.

4. THE CASE OF THE PARISH OF ST. SWILHINS, M. T. 1694, K. B. Skin. 616. Per Holt, C. J. Upon an union at common law, or by the statute of H. 8, though one church be united to another; yet this do not unite the parishes, or bind the parishioners of the church united, to resort to the church to which it is united; but it is only an appropriation of one church to the other, so that the incumbent and his successors of the other church shall be parsons of the church united; but notwithstanding this, he is bound to celebrate divine service, &c. in the church united, and the inhabitants are not compellable to resort to the other church.

5. HARDING V. THE BISHOP OF WINCHESTER AND WAKEFIELD, M. T. 1777, C. P. 2 Blac. 1162.

In *quare impedit* for disturbing the plaintiff in his presentation to the vicarage of K. and S. in the county of S.; the plaintiff declared upon a private act of parliament of the 9th Geo. 3, which act recited that the vicarage of K. comprehended the several chapelries or curacies of S. K. M. and D. and the hamlets of H. and H. that the plaintiff was the lay impropiator of the said parish and its dependencies, and patron of the said vicarage. That the vicar of K. had immemorially nominated to the said several chapelries or curacies, and that said such nominees had used to hold the same, notwithstanding the decease of the vicar, or other avoidance, but that such right had been litigated, and never decided. It also recited divers inconveniences which attended the then situation of the said vicarage and chapelries; and therefore it was enacted, that from and after the then next avoidance of the vicarage of K. and of the chapelry and curacy of S. the succeeding vicar of K. and his successors should for ever hold and enjoy the said vicarage of K. and S. And that the said vicarage of K. and S. with the hamlets of H. and H. should be a distinct vicarage by the name of the vicarage of K. and S. divided and exempt from the rest of said vicarage and curacies, or chapelries, and that the vicar of the said new vicarage should from thenceforth be a body corporate, &c. And that the vicars of the two respective vicarages of K. and S. and of B. and P., and the curates of the perpetual curacies of M. and D. should from and after the next avoidance of the said vicarage of K. as aforesaid, be presented, instituted, collated, and inducted or licensed, as other parsons vicars, or perpetual curates, were accustomed to be. And that the perpetual advowson of both the said vicarages and curacies should be vested in the plaintiff and his heirs; and that the perpetual advowson of K. and S. and of D. and M. should be for ever united and vested in one and the same person; and never separated or divided. The declaration then stated that at the time of passing the said act, G. W. died; whereby the said vicarage of K. became vacant for the first time since the passing of the act; whereupon it belonged to the plaintiff to present to the said vicarage of K. and S. but that the defendants hindered him, &c. The defendant, the Bishop of Winchester, in his plea disclaimed all title but as ordinary. But the other defendant, W. pleaded three several pleas; first, that the vicar of K. had immemorially enjoyed the nomination to the chapelry of S.; and that the curate so nominated had for a long time, viz. for 500 years, used to hold the said chapelry, notwithstanding any avoidance of the vicarage by death or otherwise; that in the said statute an exception is made to all the vacarial right of the then vicar of K. with respect to the nomination of curates to the several curacies therein mentioned, in case of the avoidance of such curacies during his life;

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* But if several churches are united, and the presentation is given by turns to the several patrons, showing a presentation to his own turn before the union will be sufficient. *Grocers' Company v. the Archbishop of Canterbury*, Bl. Rep. 770; vide post, 330.

except only as to the claim of right of removing the curates from their several curacies; that on the 1st of January 1776, the said G. W. being then vicar of K. nominated the defendant to the curacy of S. being then vacant, to which he was lawfully licensed, &c. and still is curate as aforesaid. Second, that the said act was passed upon the petition of the lay impropriator and patron, without the participation of the vicar; and third, that the vicar of K. had immemorially used upon any vacancy of the chapelry of S. to take upon himself the cure, and to collect the profits thereof, until he nominated another. That the curacy being vacant at the time of making the statute, G. W. the vicar, then served the cure until afterwards, namely, on the 1st of January 1776, he nominated the defendant to the same. To the first plea the plaintiff demurred; because, first, it did not show how the curacy became vacant, and whether after or before the act of parliament; secondly it did not confess or deny that at the passing of the act, the said G. W. was vicar of K. and held the curacy of S. as parcel of the same; or that the said vicarage became vacant by his death; or that the same was the next avoidance thereof after passing of the act; and thirdly, that no material issue could be taken on the said plea. The plaintiff also demurred to the second plea, for the same causes. And to the third plea he replied, that the said G. W. held the curacy of S. as part and parcel of his vicarage, and belonging thereto. *Per Cur.* The plaintiff's declaration is ill, for according to his own showing, the union of the vicarage of K. with the chapelry of S. was not to take place, pursuant to the act of parliament, until after the next avoidance, as well of the chapelry of S. as of the vicarage of K. then, and not before, it was to form a new vicarage of K. and S. united. Now the plaintiff, in his declaration, has only stated an avoidance of the vicarage of K. since the passing of the act; but no avoidance of the chapelry of S. since that time; which must happen before the new vicarage can exist. Hence, as there is not, in fact, at this time, any such vicarage as the vicarage of K. and S. no *quare impedit* will lie for a disturbance of the right of presenting thereto. Judgment for the defendant.

6. *WILSON qui tam v. VAN MILDERT*, E. T. 1801, C. P. 2 B. & P. 394.

In a declaration for non-residence, the benefice of the defendant was described as the parsonage of the rectory and parish church of the united parishes of, &c. It was objected on the trial, and afterwards made the ground of an application for a new one, that the benefice was misdescribed; as the 68th section of 22 Car. 2, c. 11, provides that the parishes therein enumerated shall continue distinct in all respects whatsoever, except in those cases which are expressly mentioned; and as it is not declared in any part of the act, that the rectories of the several parishes in question shall be united, they must still be considered as three separate rectories, and cannot be described as united into one. *Sed Per Cur.* By the union the patronage is preserved; but the incumbency of the two benefices is destroyed; it is the incumbency, and not the rectory, which is the subject of the suit; and if that be well described, the plaintiff may maintain his action. Judgment for plaintiff.

VII. OF PRESENTATION,* ADMISSION,† INSTITUTION,‡ AND INDUCTION.§

1. *REX v. THE BISHOP OF LONDON*, M. T. 1693, K. B. 1 Ld. Raym. 26. *Per Cur.* When the king hath interest in the presentation, and the pre-

* Presentation is the offering a clerk by the patron of an advowson to the ordinary to be instituted. By the statute of frauds, all presentations must be in writing; and even whilst it was permitted to be done by parol, common reputation was not admissible evidence to prove the presentation. *Tillard v. Shebeare*, 2 Wils. 366; *the King v. Eriswell*, 3 T. R. 723.

† Admission is the approval of the presentation by the ordinary, and is thus declared: "I, A. B. by virtue of this instrument, from John, Lord Bishop of L. in his triennial visitation to all clerks, rectors, vicars, ministers, chaplains, and curates, whatsoever, within this diocese directed, do admit F. G. into real, actual, and corporeal possession of this church of B. together with all the profits, dues, members, and appurtenances, whatsoever thereunto belonging, in the presence of those whose names are under-written." *Mirehouse*, 183.

‡ Institution is the commitment of the clerk of the cure of souls. The form and manner

§ Induction is necessary to complete the possession of the incumbent. This is perform-

When the king has an interest in the presentation, and he creates

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[326] rogative happens at the same time, the interest shall be preferred; as if the king be seized in fee of advowson, and he creates the incumbent bishop, he shall present as patron, that being a title precedent to that of the prerogative.

2. HALL V. THE BISHOP OF WINCHESTER, H. T. 1681, K. B. 3 Lev. 47. S. P. HARRIS V. AUSTEN, 3 Bulst. 47.

Where the same person, being both patron and incumbent, dies, the heir shall present.

Quare impedit. Upon the pleadings it appeared that one and the same person, being parson of the church and seized in fee of the advowson, died. Upon demurrer, it was objected, that the advowson descended not to the heir till after the death of the ancestor, and that by the death of the ancestor the church was void, and the avoidance thereby severed and vested in the executor; but the whole Court, upon the first argument, adjudged that the heir should exercise the right of presentation; for the descent to the heir, and this fall of an avoidance to the executor, happened in one instant; and where two titles concur in the same instant, the elder right shall be preferred, as in the case of joint-tenants; the one devises his part, if the title of the devisee, and of the survivor fall in one instant, the title of the survivor, being the elder right, shall be preferred. See 2 Bac. Ab. 419; Cro Jac. 371.

3. BISHOP OF SALISBURY V. PHILLIPS, H. T. 1698, K. B. 1 Ld. Raym. 536; S. C. 1 Salk. 43.

Joint-tenants may make partition by turns.†

Per Holt, C. J. Doubtless, joint tenants of an advowson may make partition to present by turns, which would divide the inheritance *aliquatenus*, and create separate rights, so that the one shall present in the one turn, and the other in the other, which is a sufficient partition; for partition of the profits is a partition of the thing, where the thing and the profits are identified. It cannot make two advowsons out of one, but it can create distinct rights to present in several turns. And in this case each of the parties is said to have *advocationem medietatis ecclesæ*. See 1 Inst. 186, b; 4 Rep. 75; id. 686; Doctor and Student, e. 30, 19, 9; 1 Ves. 413, 415; 3 Cruise's Dig. 35; 7 Bro. Parl. Cases, 296; 2 Atk. 482.

Qu. whether, if there be a presentation by

4. ANON, E. T. 1682, C. P. 2 Vent. 39.

On a *quare impedit*, sued at bar, it appeared, that parceners had made of it this: the clerk kneels before the ordinary whilst he reads the words of the institution out of a written instrument, drawn for this purpose, with the episcopal seal appendant, which he holds in his hand during the ceremony. 1 Inst. 344, a; Wats. 155; 3 Cruise, Dig. 18; Mirehouse, 184. By the Stamp Act, 55 G. 3, c. 184 institution granted by any archbishop, bishop, chancellor, or other ordinary, or by any ecclesiastical court, in and to any ecclesiastical benefice, dignity, or promotion, in England, where the same shall proceed on a presentation, must be on a two pound stamp; where the same shall proceed on the petition of the patron to be himself admitted and instituted of the benefice, dignity, or promotion, shall be of the yearly value of ten pounds or upwards in the king's books, on a thirty pound stamp; or if the same shall be of any other description, on a fifteen pound stamp.

ed by the ordinary issuing a mandate. directed in general to the archdeacon, or if the church be within a peculiar to the dean or judge commanding the induction of the clerk; the ceremony is performed according to the tenor and language of the mandate. by vesting the incumbent with full possession of all the profits belonging to the church. Accordingly, the person who inducts usually takes the clerk by the hand, and lays it upon the ring of the church-door, or if the church is in ruins, then upon any part of the wall of the church or church-yard, and says to this effect, "By virtue of this mandate I do induct you into the real, actual, and corporeal possession of the church of C. with all the rights, profits, and appurtenances thereunto belonging." After which the inductor opens the door and puts the person inducted into the church, who usually tolls a bell to make his induction public, and known to the parishioners; which being done, the clergyman who inducted the clerk endorses a certificate of his induction on the mandate, which is witnessed by the persons present. See 1 Burn. Ecc. Law, 156.

* 2 Com. Dig. tit. Eq. H. 7, it is suggested that a presentation by the king ought to state by what title he presents.

† And by the stat. 7 Ann. c. 18, it is enacted, "that if coparceners or joint-tenants, or tenants in common be seized of any estate of inheritance in the advowson of any church, or vicarage, or other ecclesiastical promotion, and a partition is or shall be made between them, to present by turns, that thereupon every one shall be taken and adjudged to be seized of his or her separate part of the advowson, to present in his or her turn; as if there be two, and they make such partition each shall be said to be seized, the one of the one moiety, to present in the first turn, the other of the moiety to present in the second turn; in like manner if there be three, four, or more, every one shall be said to be seized of his or her part, and to present in his or her turn."

partition to present by turn, and an usurpation had happened in the turn of one of them; whether this put all the rest out of possession, or whether the sister which had the next turn, should present when the next church became void? The Court inclined to an opinion that it should put all out of possession, but would not permit a special verdict, though a case was afterwards made for the consideration of the judges.

5. ARTHINGTON v. THE BISHOP OF CHESTER, E. T. 1790, C. P. 1 H. Bl. 418.

Per Cur. If there are four coparceners, the eldest and second present; a stranger usurps on the third, this usurpation will only affect that turn; and the fourth may present when her turn comes, and if disturbed, she may bring a *quare impedit*, for the usurpation only displaced the turn of the third. See Bro. Qua. Imp. pl. 118; 1 Inst. 18. a; Plow. 333.

6. BARKER v. THE BISHOP OF LONDON, H. T. 1752, C. P. Willes, 659; S. C. 1 H. Bl. 412.

A. B. and C. three sisters, are coparceners of an advowson; A. marries D. on whom A.'s third is settled; B. marries E. and C. dies, having devised her third to F. the son of B. and E. D. E. and F. being thus entitled, under or in right of the several original coparceners, a *quare impedit* is brought by G. a stranger, against D. and E.; E dies pending the writ, and the share of B. previously deceased, thereupon descends to F. in addition to the share devised to him by C. D. suffers judgment to go by default. This judgment against D. is a bar to a *quare impedit* brought by D. and F., in which D. is summoned and severed, to recover the same presentation, but is not a bar to F.'s right to recover, on the next avoidance, in his turn. Lord C. J. Willes, in delivering the judgment of the court, said, that the two cases on which he principally relied were in Bro. Ab. title Presentation, s. 26; 24 E. 3; and Bro. Ab. tit. *Quare impedit* pl. 118; 2 H. 7. The former is thus, A. and B. have a right to present to a vicarage by turns. A., whose turn it was, suffered the living to lapse to the bishop who collated a person to it; and, upon his death, B. presented, and held that he had a good right, for that A. by allowing the living to lapse to the bishop, and that it should not be any prejudice to B. The other case was this, four coparceners of an advowson; the first daughter presents to the first avoidance; the second daughter to the second; and on the third avoidance, a stranger usurps on the third daughter, and presents by usurpation and such presentee was instituted and inducted, and died. The fourth shall not lose her turn by the third daughter suffering a stranger to present by usurpation, but shall present to that avoidance. In this the whole court agreed, though they doubted as to some other points of the case.

7. THRALE v. THE BISHOP OF LONDON, E. T. 1790, C. P. 1 H. Bl. 411.

It was objected to the pleadings in this case, that it was alleged that the coparceners did not agree to present in turns, instead of, could not agree; but the objection was overruled; and Lord Loughborough, in delivering judgment, said, "There is but one objection made to this plea, viz. that it is pleaded that the coparceners did not agree to the present, and therefore that, on the first avoidance, the presentation belonged to the eldest. The argument is, that, in the language of many books and some pleadings, the right of presenting by turns is said to arise when coparceners cannot agree, and many authorities have been quoted to prove this position. It is also laid down in Bro. tit. Present al Eglise. 19; Fitz. Nat. Brev. Qua. Imp. 81; Co. Litt. 166. b; Doctor and Student. b. 2. c. 30; and it is clear law that the first presentation in such a case of mere right, belongs to the eldest, descends to her issue, goes to her husband by the courtesy, and passes by her grant. The expression then that they cannot agree, therefore the exercise of the right must be by turns, is generally true. It is a legal presumption, that on a right so circum-

* Or if they cannot agree to present, the eldest sister shall have the first turn. the second they could shall have the next turn, and so of the rest according to their seniority; and this privilege not agree. extends not only to their heirs. but to the several assignees of every coparcener whether they acquire the estate by conveyance or by act in law, as tenant by the curtesy, who shall have the same privileges by presenting in turn as the sisters had. See Plow. 333; Cro. Eliz. 18; 1 Inst. 18, a. 166, b. 243, a; 1 H. Bl. 412.

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stanced, they cannot agree. The eldest has it *pleno jure*, and the concurrence of the others would only operate to their own prejudice. But it is not a position of fact, that they cannot agree, nor could any issue be taken upon it. If they do not agree, the eldest must present in the first turn an actual agreement alone can prevent it. No authority has been cited to show it to be bad pleading to state that they did not agree; on the contrary in the case of this very advowson, the phrase in the pleading is distinctly that they "did not agree;" and the court in giving judgment, reason upon it as precisely synonymous with "could not agree." Besides as this is a plea in bar, certainly to a common intent is sufficient.

8. *BISHOP OF SALISBURY v. PHILIPS*, M. T. 1688, K. B. 1 Salk. 43; S. C. 1 Ld. Raym. 535; S. C. Carth. 505; S. C. 12 Mod. 321.

A composition to present by turns may either be by record or by deed, or by parol, between privies in blood; but between strangers it can only be by deed.

The plaintiff declared that A. and B. were seised in fee as joint-tenants of an advowson in gross, and by indenture agreed from thenceforth to be seised thereof as tenants in common, and not as joint tenants; and they and their respective heirs should present severally and by turns, and showed several presentations alternately; and that A. died, and his moiety descended to C. and makes his title by grant of the next presentation from C. to D., his executors, administrators and assigns, in whose life the church became void; and that D. made his will and died, and it belongs to the plaintiff, as executor, to present. Bishop claims title by lapse, plaintiff replies, the testator presented Symes within six months, and the bishop refused him; defendant rejoined. He gave him three days' time to prepare for examination, and he never came again; *absque hoc* that the bishop refused Symes at the presentation of the testator. Upon this issue was found for the plaintiff, and on a writ of error, the judgment was affirmed. The Chief Justice said, that a composition might be either by record or by parol; that if either privies in blood, as copartners, or strangers in blood, as tenants in common, or joint-tenants, agree by record to present by turns, and one present, the other is not by usurpation put to a quare impedit; and that whether the presentation be by one privy to the agreement or by a stranger; see West. 2. 5.; Inst. 362. 2ndly. That if either privies in blood, as parceners, or strangers, as tenants in common or joint tenants agree by deeds to present by turns, the composition is good; and if it be once executed on all sides, he that brings a quare impedit need not mention the composition which shows the very right and inheritance to be severed, and that a separate interest is vested in each of them to present alternately, and that the plaintiff needed not have declared of the composition or indenture in this case. See Dy. 29. 3dly. By parol, for so a composition may be between parceners; but between strangers in blood composition cannot be without deed. See F. N. B. 60. 62. a. f; 11 H. 4. 3. b.

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9. *THE GROCER'S COMPANY v. THE ARCHBISHOP OF CANTERBURY AND BACKHOUSE*, T. T. 1771, C. P. 2 Blac. 770. S. P. *CALLAND v. TROWER*, 2 H. Bl. 333.

The prerogative presentation to a church (the advowson of which is held by several in common) does not supply the turn of the patron otherwise entitled to present.

In a quare impedit, the plaintiffs declared upon their seisin of the advowson of A. in 1663, and of the seisin of the Archbishop of St. M. and St. P. in 1662, by presentment or collation of their several clerks, and institution and induction thereon, that the churches were all burnt down in the great fire of London, 1660, and by statute 21 Car. 2. c. 11. it was among other things enacted, §63. that the parishes of St. M., St. P. and A., should be united, and the church of St. M. as the parish church; and §68. that the several patrons of all the churches united by that act should present to the several rebuilt churches by turns. The first presentation to be made by the patron of such of the said churches, the endowments whereof were of the greatest yearly value; by virtue whereof the archbishop and the company became seised of the advowson so united, and entitled to present in turns. That on the 23d of September, 1679, Archbishop S. collated T. P. in right of his archbishopric, as his first turn; on whose death Archbishop T. collated S. B. the 21st November, 1693, in right of his archbishopric, as his second turn. That B. being made bishop of R. King George I. by virtue of his prerogative royal, on the 10th of July, 1720, presented Dr. L.; and L.

being made bishop of St. A. King George II. by virtue of his Prerogative, on the 16th of February, 1744, presented Dr. T. N.; and that church being now void by his resignation, it belonged to the plaintiffs in their turn, being the third turn, to present, &c. But that defendants, the archbishop and B. hindered them. To this declaration the archbishop demurred generally; but the defendant B. pleaded that he was parson, on the collation of the archbishop; he admitted the declaration as far as to the union of the three churches, and the seisin of the archbishop and the company; and that they were entitled to present in such manner and form as in the declaration mentioned. But he said, that at the time of passing the act, St. M. was of greater value than either of the other churches, and A. of greater value than St. P. viz. St. M. 33l. 12s. 3 1-2d.; A. 19l. 3s. 9d.; St. P. 13l. 6s. 8d. by reason whereof the archbishop was entitled to the first turn, the Grocers' Company to the second, and the archbishop to the third. The archbishop S. collated P. as in his first turn, upon whose death it belonged to the company to present, as in their turn, being the second turn; but that Archbishop T. usurped and collated B. He then stated the two prerogative presentations as above, and the resignation of N. by virtue whereof it belonged to the present archbishop to collate to the said church in his turn, being the third turn; and that he collated the defendant B. To this plea the plaintiffs replied, protesting the endowment of A. was not at the time of the act of greater value than St. P. and that Archbishop T. did not usurp as alleged; and they said that it belonged to the plaintiffs in their turn, being the third, to present; and they traversed that it belonged to the plaintiffs to present to the said church at the second turn; the defendant B. demurred to this replication, because the plaintiffs had not traversed or put in issue any matter of fact, but had only traversed and attempted to put in issue a matter of law. After this case had been twice argued, *Per Cur.* There are two principal questions in the present case; the first arising on the archbishop's general demurrer, whether the plaintiffs have set forth a good title in themselves upon their own declaration? The second arising upon the defendant B.'s plea, whether the defendants have set out a better title. Upon the first question four objections were taken to the count by the defendant's counsel; 1st. That the plaintiffs have not averred any seisin in themselves of the advowson of these united churches; the same objection was taken in the case of *Reynoldson v. Blake*, 3 Lev. 435. And certainly an averment of seisin by representation, by presentation in themselves, or those under whom they claim, is absolutely necessary; but we are of opinion that there is a sufficient averment of seisin in the present case; for the plaintiffs have stated a seisin of A. in themselves before the union; they have stated the act of union, their title to present by turns, and the archbishop's presentation in consequence. If this advowson is to be considered as one newly created by the act, it is impossible the rule should hold of the necessity to state a prior seisin upon the first claim of the patron to present; or if this be a derivative advowson arising from the union of the three component parts, the derivative seisin is surely sufficiently stated and averred. 2dly. It was objected that the plaintiffs should have stated what the rota of presentation is, and have set out the yearly value of each church at the time of the union in order to have determined that rota. And to be sure, it is necessary to state the commencement of a right to present by turns, either by words, or by necessary intendment. If a manor be divided into three parts, with one-third of the advowson appendant to each, the very appendancy is sufficient to show by necessary intendment that the right commenced by prescription; and in case at bar there is sufficient stated by way of history to show the priority and rota of the turns; viz. that the archbishop presented in right of his fee upon the vacancies in 1679, and 1693, being the first and second turns; and that now it is the right of the plaintiffs to present, being the third turn; as to the value, if a dispute had happened at the first vacancy in 1679, it would have been necessary to have stated the value, in order to ascertain the title to the first presentation; but as that is not necessarily the criterion to determine the second or third, it is not necessary to set it out upon the present vacancy,

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Where several churches are united, and the presentation given by turns to several patrons, showing a presentation to his own church before the union suffices.

A prerogative presentation does not operate to defeat but to suspend the title, and leaves every thing derived out of

[331] the title, or in any manner connect ed with it, in statu quo. It is not a right of patronage, nor a right of eviction, nor an usurpation; it does not supply, but suspends or postpones the turn of the patron or patrons; it is a right if there are several patrons, takes away the right of none, leaves the rest entire, but postpones the turns of all.

3dly, It was objected, that the plaintiffs' claiming the third turn have not shown this to be the third turn, but rather the fifth. But we are all of opinion that though in point of fact this is the fifth vacancy, yet it is but the third turn as between the patrons; because the prerogative presentations do not supply the turn of the patron. These prerogative presentations appear to be as old as Edward II.'s time, and were exercised under Henry VIII. and Queen Elizabeth. The law concerning them was doubted in the time of Car. 2. and since; but was finally determined in favour of the crown in King William's time. This is not a right of patronage in the king, nor is it a right of eviction, for it ejects nobody; nor is it an usurpation, for it is a rightful act. But it is a contingent casual right arising upon a particular event, namely, the incumbent's becoming a bishop.

It was determined in the case of St. James's parish that the statute of 1 James 2. which vested the presentation in the Bishop of London and Lord Jermyn by turns, did not bar this right of the crown, which arises toties quoties the event shall happen. But then this does supply, it only suspends or postpones the turn of the patron; it postpones the turns of both or all the patrons if more than one, but does not take away the right of one and leave the rest entire, which would be rank injustice, and this being the act of law nemini facit injuriam. The 4th objection was, that it is not averred that the third belongs to the plaintiffs; but this is merely consequential, and the Court will draw the consequence; as it is stated that the archbishop presented of right in the first and second turns, it follows, that the company must now be entitled to the third, there being three churches united, and of course three turns of presentation. Therefore we are all of opinion, that on the face of the declaration the plaintiffs have set out a good title in themselves, and consequently that the demurrer of the archbishop is bad. Next as to the plea of the defendant B. which purports to make out a better title than the plaintiffs', it is observable the act of 1 James 2. for St. M. and St. I. parishes, vests an alternate presentation in the Bishop of London and Lord Jermyn; and that the bishop should present first. Had a similar rule been laid down here as that, first, the archbishop, secondly, the company, thirdly, the archbishop, if there should present, and so on alternis vicibus, it might have been necessary to determine the question whether, upon an usurpation by the archbishop's predecessors in the second turn, the company shall present in the third turn, or shall wait till the fifth comes round; but as our present opinion is, it will not be necessary to determine it, for we think that no such rota is clearly established; by the act the first turn depended on the comparative value of the endowments, there the act stops, and gives no rule for determining the second turn. Where there are only two churches united, and consequently only two turns, the fixing of the first consequently fixes the second; but that is not the present case. This is a singular instance out of thirty-four unions of uniting more than two parishes; the words of the general rule do not reach this case, which probably was forgot, and certainly not expressed in the act; there being then no positive rule for fixing the second turn, let us consider what could have been done in case the right had been disputed in 1693. It might, perhaps, have been determined by analogy to the rule for the first turn; by analogy to the union of two churches where the presentations are alternate; by analogy to presentation by parceners or tenants in common of one advowson; or they must have resorted to equity, or perhaps to parliament to settle it. Still the rule must have been uncertain and arbitrary; they therefore very wisely agreed to it in 1693, which agreement we collect from the acquiescence, though what was the rule by which that agreement was framed does not appear. There is no reason to suppose that it either was or ought to have been settled by the value in the king's books, upon which the defendant rests his plea. That could not be the rule even in the first presentation, for the words of the act are, "those churches where endowments are of the greatest value; referring to the time when the act was made. The value in the king's books is never the standard of private, but only of public rights. Thus in 17 Eliz. c. 28. subsidies are to be rated according to the

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value of the exchequer records; and by the general statute of union, 17 Car. c. 3. the right of patronage is settled to the real value of the living; but the king's rights are saved according to the value in the king's books; and the same distinction occurs in the very next clause of the statute now under consideration. Perhaps the rota was settled in 1693, according to the real value of the livings at the time of the union, or according to the order in which the parishes are named in the act; or because the archbishop's church was rebuilt, and the company's not; or because the archbishop's two livings put together are more than double to that of the company's; or from deference to the archbishop's station, or from other causes; but agree they most certainly did. The company withdrew its claim, gave the archbishop the advantage, and suffered him to collate in the second turn as well as the first without any dispute, and the archbishop shall not now be admitted to controvert the acts done by his predecessors in right of his fee. This acquiescence is an evidence of an agreement on both sides, which neither shall now contradict. We therefore think that the defendant B. has made out no title by his plea; and this being the case, it is immaterial how regular the replication and traverse may be. But the plaintiffs, seemed to have judged rightly in not traversing the value of the livings, which would have been an immaterial traverse, because the value is not the criterion which governs the second turn; rightly, also, in not traversing the usurpation of archbishop T.; for that is only a consequence that must result or not result from the right to the second turn, which is therefore the proper and material thing to be traversed. And this is not merely a traverse of a point of law, but a law connected with fact, which is clearly traversable. Upon the whole we are of opinion that there must be judgment for the plaintiffs.

10. ROGERS v. HOLLED AND OTHERS, M. T. 1775, C. P. 2 Black 1039.

Upon a bill being brought in the Court of Chancery to set aside the grant of an advowson for fraud, &c. that Court directed a case to the Court of Common Pleas for their opinion, touching the effect of a certain instrument, purporting to revoke a presentation. The case stated, that T. S. being seised in fee by lease and release of the 7th and 8th of February, 1764; and by fine in consideration of 525l. conveyed to T. H. and his heirs, the advowson of H. B. in the county of L. That in Hilary Term, 1765, S. filed his bill in chancery against H. to set aside the transaction as fraudulent. That in October following, while that suit was pending, the incumbent died; whereupon S. presented R., and H. presented his brother K.: and the Bishop of Lincoln declining to institute either of them, each brought his *quare impedit* against the other, and against the bishop. That in Easter Term, 1767, H. and K. filed their cross bill; and the 12th of December, 1769, while both causes were at issue, S. and H. by indenture, agreed that in consideration of 1050l. more paid by H. A. to S. and all costs, S. should discontinue his *quare impedit*; and that the original and cross bill should both be dismissed; and S. by that indenture, grants, bargains, sells, and confirms, unto the said T. H. and his heirs the said advowson. On the same day S. wrote a letter to the bishop, acquainting him that all disputes were at an end between him and H.; and that he had by indenture of that date confirmed the title of H. and his heirs to the advowson; he consequently by this letter recalled and made void his presentation of R. and desired the bishop to deliver up the same to be cancelled, and to accept K. as his clerk in the stead of R., the *quare impedit* brought by S. being then discontinued. And the question was, whether the letter or instrument perporting to revoke the presentation was a good and effectual revocation in law? *Per Cur.* There is no doubt but that our law a lay patron may revoke his presentation at any time. The canon law itself allows it under another name, by permitting the patron to vary *cumulando variare Presentationem*. But by the common law, it is expressly held that the patron may revoke. Next, as to the question whether S. (being no longer legal patron) could revoke his presentation, that is an objection that does not lie in the mouth of the present plaintiff. For if the legal interest of S. ceased by the

first conveyance in 1764, then he had no right to present in 1765. If the objection arises from the confirmatory deed in 1769 the answer is, that the deed of 1764 and that of 1769 are all one transaction, and there is no priority between them. So that in this respect, the revocation is to the full as good as the presentation. In regard to simony there is none, this being a *bona fide* compromise, and not a corrupt agreement to present. The presentation was certainly revocable by the principles of the common law; because it vested no right in any one, not even in the clerk presented; for if the clerk had a right, the law would give him a remedy to recover it when invaded; but there is no species of common law action open or competent to a clerk to recover a presentation when obstructed, but to the patron only.

If the right of nomination is in one person, and that of presentation in another, the latter is to judge of the qualification of the person nominated, in the same manner as a bishop does; but if a person presenting, objects to the nomination on the

[334] ground of immorality, that must be tried by a jury; hence, if, on an application for a mandamus against the present or for not presenting a nominee, the question is, whether the prosecutor acts ministerially in allowing the nomination by the presentee, or whether he may approve or reject it. The court will not determine it upon affidavits.

11. THE KING v. THE MARQUIS OF STAFFORD AND S. GIFFARD, Esq. E. T. 1790, K. B. 3 T. R. 646.

The Court of King's Bench granted a rule for the defendants as lords of the manor of S. to show cause why a mandamus should not issue to command them to present to the ordinary W. M. clerk, to be curate of the chapel of W. in the manor of S. This application was founded on affidavits, stating the usage to be that the minister of this chapel ought to be appointed by the inhabitants of W. and presented and allowed by the lord of the manor of S. It appeared from an ancient roll of the manor, that certain proceedings had been had before the commissioners of charitable uses. And that it had been agreed that certain copyholds should be let, &c. towards the reparation of the chapel and the maintenance of a curate, &c. who should be appointed by the inhabitants of W. and presented and allowed by the lord of the manor of S. And that the person so appointed should reside on the curacy; and on complaint of his nonresidence, or any other misdemeanor, the lord of the manor should give him notice to reform, and if he did not, should present, and allow another curate to be nominated by the inhabitants. The roll also ordered that the lands should be granted to trustees, who should be regularly chosen in succession. The affidavits then stated, that the profits of those lands had been appropriated accordingly; that on the death of the late incumbent, W. M. and A. H. were the candidates, and a poll was proposed by the defendants; that M. had 67 votes, and H. 29; on which the former was appointed, but that the defendants refused to allow his nomination. From the affidavits on the other side, it appeared that this was originally a free and private chapel, and belonged to the lords of the manor of S. and was purely a donative; that the major part of the inhabitants of W. had, as much as they could, elected A. H. and had desired them, the defendants, to allow him, &c. They presented, &c.; and that H. entered upon and performed the office. A similar appointment was alleged to have taken place with regard to the late incumbent; and with respect to the recent election it was stated, that 49 of M.'s electors were not resident in the town of W. but in adjoining districts of W. and that only four who voted for H. were liable to that objection; that the defendants had approved of H.'s nomination, and allowed and presented him accordingly; and that M. was a man of indecent and immoral life, and that he had not only neglected his duty as a minister, but had been actually in a state of drunkenness while in the performance of divine service. In showing cause against this rule, three points were insisted on. 1st. That the defendants did not act merely ministerially in allowing the nomination by the freeholders, but that they had a right to reject the person so nominated. 2dly. That this benefice was purely a donative; and though the defendants, who were the patrons, could not arbitrarily reject the person nominated by the resident freeholders, yet that they might reject him for any cause, which would be a sufficient ground to warrant a bishop in rejecting a person presented to him in the case of a presentative benefice. And 3dly. That M. had another specific legal remedy by *quare impedit*, which was a complete answer to an application for a mandamus.

Per Cur. The first point is too important to determine upon affidavits. As to the second, if the defendants were to be considered as trustees, they were, in the execution of that trust, to exercise a proper discretion, and to

judge whether the party were or were not *idoneous*, as a bishop may do in the case of a presentative, and may absolutely reject the nominee on the account of his being illiterate; but of this question of fitness he is the sole judge for it cannot be tried by a jury. But as M. had been rejected on account of immorality and indecent conduct, that question might be properly determined by a jury. If, however, these facts were true, the defendants might return them upon the record; and as to the third point, we think that a *quare impedit* will not lie; therefore, as the party had no other remedy, rule absolute. But on this matter being mentioned the next day, the Court desired that the third question might be re-argued; which being done, *Per Cur.* It appears from the ancient roll that certain proceedings have been had before the commissioners of charitable uses respecting the lands appropriated to the maintenance of the curate; therefore it seems as if the inhabitants have only equitable right; if so this court cannot interfere; or if the inhabitants have a legal right such right may be inserted in a *quare impedit*. So that *quacunqve via data* the rule must be discharged. Perhaps a better remedy will be an information in the Court of Chancery, in the name of the attorney-general; for a party applying for a mandamus must take out a legal right, though if he shows such legal right, and there be also a remedy in equity, that is no answer to an application for a mandamus; for when the Court refuses to grant a mandamus because there is another specific remedy, they mean only a specific remedy at law. See 3 Burr. 1265; Doug. 506; 3 Burr. 1046; 5 Rep. 589; Dyer. 48. 1 T. R. 396; pl. 17; Burn. E. L. 276; Co. Lit. 314; 2 Wils. 150; 2 Stra. 1023; 2 Inst. 363; 1 T. R. 404.

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VIII. OF THE REMEDIES CONNECTED WITH ADVOWSONS.*

(A) QUARE IMPEDIT.

(a) When maintainable.

CROSSMAN v. SIR JOHN CHURCHILL. T. T. 1675, K. B. 2 Mod. 97.

Upon a *quare impedit* a special verdict was found, viz. that G. R. was seised of the advowson in fee, and died seised, leaving two sisters, who were his co-heirs; that they and J. R. being also one of the same family, and pretending a right to the estate, for preventing suits that might happen, all enter into an agreement by indentures, mutually executed, by which it was agreed, that J. R. should hold some lands in severalty, and the co-heirs shall hold other lands in the like manner; and with regard to the advowson a temporary provision was made, that each of them should present by turns, and this arrangement was to continue till partition could be made. An act of parliament was afterwards made, confirming the indenture, which enacted "That every agreement therein contained shall stand, and that all the rest of the lands not particularly named and otherwise disposed of by the said indenture, should be held by these three in common." One of the three, who by agreement was next to present, grants the next avoidance (the church being then full) to the plaintiff. The question was, whether these three persons were not tenants in common of the advowson? and if so, then the grant of the next avoidance cannot be good by one alone, because he had not the whole advowson, but only a right to a third part. The Court were all of opinion that judgment should be given for the plaintiff; for there being an agreement that there should be a presentation by turns, and consequently for one turn each has a right to the whole advowson, by reason of the act of parliament by which that agreement is confirmed, and thereby an interest is settled in each of them till partition made; but the agreement would have vested no interest in either of them without an act of parliament to corroborate it; though in that case there would have been no remedy upon it but by action of covenant. See 12 Mod. 321; 6 Co. 12; 2 Roll. Rep. 253; F. N. B. 52; 2 Inst. 365.

* The law has given the patron three distinct species of remedy for any obstruction he may experience in the exercise of his right of presentation, namely the writ of right of advowson, which is a final and conclusive remedy; 2 Inst. 356; F. N. B. 30; Co. Rep. 150; 10 Co. Rep. 134; and two inferior possessory actions, called an assize of *darrien presentment*, 3 Bl. Com. 246, and a writ of *quare impedit*. The latter is the only action now in use. See post, tit. Mandamus; and the King v. the Marquis of Stafford, 3 T. R. 646.

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(b) Process,* Pleadings,† and Evidence.

1. REX v. THE ARCHBISHOP OF YORK, E. T. 1680, 3 Lev. 16.

Quare impedit, in which the plaintiff made title that the defendant was presented upon a simonical agreement; the archbishop pleaded that he claimed

Where the patron is not disturbed, and has no pre-judice by the suit, the writ may be

* The usual proceeding, anterior to the bringing of this writ, is as follows:—Upon the vacancy of a living, the patron, on notice being given him by the ordinary (statute 44 Geo. 3, c. 43.) is bound to present within six calendar months, otherwise it will lapse to the bishop. But if the presentation be made within that time, the bishop is bound to admit and institute the clerk if found sufficient, unless the church be full, or there be notice of any litigation. For if any opposition be intended, it is usual for each party to enter a *caveat* with the bishop to prevent his institution of his antagonist's clerk. An institution after a *caveat* entered is void by the ecclesiastical law; 1 Burn, 107; but this the temporal courts pay no regard to, and look upon a *caveat* as a mere nullity; 1 Roll. Rep. 191. But if two presentations be offered to the bishop upon the same avoidance, the church is then said to become litigious; and if nothing farther is done, the bishop may suspend the admission of either, and suffer a lapse to incur; yet if the patron or clerk on either side request him to award a *jus patronatus*, he is bound to do it. A *jus patronatus* is a commission from the bishop, directed usually to his chancellor and others of competent learning, who are to summon a jury of six clergymen and six laymen, to inquire into and examine who is the rightful patron; 1 Burn, 16, 17; and if upon such inquiry made, and certificate thereof returned by the commissioners, he admits and institutes the clerk of that patron whom they return as the true one, the bishop secures himself at all events from being a disturber, whatever proceedings may be had afterwards in the temporal courts. The clerk refused by the bishop may also have a remedy against him in the spiritual court, denominated a *duplex querela*: which is a complaint, in the nature of an appeal to the ordinary to his next immediate superior; as from a bishop to the archbishop, or from an archbishop to the delegates; and if the superior court adjudges the cause of refusal to be insufficient, it will grant restitution to the appellant.

Thus far matters may go on in the mere ecclesiastical course; but in contested presentations they seldom go far; for upon the first delay or refusal of the bishop to admit his clerk, the patron usually brings his writ of *quare impedit* against the bishop for the temporal injury done to his property in disturbing him in his presentation. And if the delay arises from the bishop alone, as upon pretence of incapacity or the like, then he only is named in the writ; but if there be another presentation set up, then the pretended patron and his clerk are also joined in the action; or it may be brought against the patron and clerk, leaving out the bishop; or against the patron only.

Immediately on the suing out of the *quare impedit*, if the plaintiff suspect that the bishop will admit the defendants or any other clerk pending the suit, he may have a prohibitory writ, called a *ne admittas*; F. N. B. 37; which recites the contention begun in the king's courts, and forbids the bishop to admit any clerk whatsoever till such contention be determined. And if the bishop does, after the receipt of this writ, admit any person, even though the patron's right may have been found on a *jus patronatus*, then the plaintiff, after he has obtained judgment on the *quare impedit*, may remove the incumbent, if the clerk of a stranger, by a writ of *scire facias*; 2 Sid. 94; and shall have a special action against the bishop, called a *quare incumbravit*, to recover the presentation, and also satisfaction in damages for the injury done him in incumbering the church with a clerk pending the suit, and after the *ne admittas* received; F. N. B. 48. But if the bishop has incumbered the church by instituting the clerk before the *ne admittas* issued, no *quare incumbravit* lies, for the bishop has no legal notice till the writ of *ne admittas* is served upon him.

† In the pleadings the plaintiff must set out his title at length, and prove at least one presentation in himself, his ancestors, or those under whom he claims; for he must recover by the strength of his own right, and not by the weakness of the adversaries; Vaugh. 7, 8; and he must also show a disturbance before action brought, Hob. 199. Upon this the bishop and the clerk usually disclaim all title, save only the one as ordinary, to admit and institute; and the other as presentee of the patron, who is left to defend his own right. And upon failure of the plaintiff in making out his own title, the defendant is put upon the proof of his, in order to obtain judgment for himself, if needful. But if the right be found for the plaintiff on the trial, three further points are to be inquired. 1st. If the church be full; and if full, then of whose presentation; for if it be of the defendant's presentation, then the clerk is removable by writ brought in due time. 2d. Of what value the living is, and this in order to assess the damages, which are directed to be given by the statute of Westminster. 3d. In case of plenary upon an usurpation, whether six calendar months have passed between the avoidance and the time of bringing the action; for then it would not be within the statute, which permits an usurpation to be divested by a *quare impedit* brought *infra tempus semestris*. So that plenary is still a sufficient bar in an action of *quare impedit* brought above six months after the vacancy happens, as it was universally by the common law, however early the action was commenced. If it be found that the plaintiff has the right, and has commenced his action in due time, then he shall have judgment to recover the present action; and if the church be full, by institution of any clerk, to remove him, unless it were filed *pendente lite* by lapse to the ordinary, he not being party to the suit, in

nothing but as ordinary; and the defendant Sowton pleaded in abatement against the that the patron was not named in the writ; and upon demurrer it was ad- incumbent* judged that he need not, because his title is not in question, but is admitted; alone as on and the king claims in affirmance of his title, and in his right but by the of- quare im pedit by si fence of the defendant; and the patron shall not be put out of possession by mony of in; the recovery in this action, for he has had the fruit of his presentation; but cambent. his clerk shall be removed for his simonry, and therefore the patron need not [337] be made a party. But Charlton, J. doubted, because the patron is not only If a quare impedit is brought a was awarded. but likewise to continue; and a respondeas ouster against one archbishop,

2. THE KING v. WARRINGTON, M. T. 1690, K. B. 1 Show, 329.

Per Holt, C. J. If the Archbishop of Canterbury be plaintiff in a quare the writ should be impedit, the writ must be awarded to the other archbishop.

3. THE KING AND QUEEN v. THE BISHOP OF CHESTER AND OTHERS, H. T. directed to the other. 1696, K. B. 1 Lord Raym. 298; S. C. 5 Mod. 297; S. C. 2 Salk. 560; In a quare S. C. 12 Mod. 185; S. C. Skin. 651; S. C. Show, 212; S. C. 3 Salk. 40. impedit it

Per Holt, C. J. Though the defendant admits Charles the First to have is not been seised of this advowson in gross by descent, and consequently that necessary Queen Elizabeth was seised in gross of it, during some time of her reign, to allege yet he does not admit it at the precise time of the 14th February, in the 12th, the exact time the party was Elizabeth was seised in gross is surplussage and immaterial; for it is sufficient seised of to allege general seisin in a quare impedit, in time of peace, in the reign of the advow such a king. Then though the defendant does not deny a fact, yet he admits son. by it only things materially alleged, but he does not admit things immaterially alleged. The time of the seisin and presentation is not traversable; and the precedents never allege the day of the seisin or of the presentation. Then if it is so immaterial that one cannot deny it, the not denying it will not amount to an admittance. Besides, nothing that is immaterial, though it be admitted, will amount to an estoppel.

4. RAYNELL v. LONG, M. T. 1693, C. P. Carth. 315.

In a quare impedit for the vicarage of B. in Devon, it was objected, upon The writ be ing quod a demurrer, that there was a variance between the writ and the count; the permittat, writ being quod permittunt cum presentare ad vicarium ecclesie de B. and the &c. presen tare ad vica conclusion of the declaration was quod ad ipsum E. (the plaintiff) ad ecclesi- am predict' sic vacantem, &c. pertinet presentare, &c. So that the writ is riam, and the declara quod permittat &c. presentare, ad vicarium; and the declaration is ad eccle- tion ad ec clesiam per Cur. That omnis vicaria est ecclesia, and that it was so held expressly in clesiam per in et presen several books, and therefore no variance in substance but only in form; be- tare, &c. sides, this was not shown for cause of demurrer, the cause shown being for is no vari ante. want of profert, and the precedents are as in this case. Judgment for the plain- tiff. Whereupon defendant brought a writ of error, and a bill in Chancery.

which case the plaintiff loses his presentation *pro hoc vice*; but shall recover two years' full value of the church from the defendant, the pretended patron, as a satisfaction for the turn lost by his disturbance, or in case of insolvency the defendant shall be imprisoned for two years; statute West, 2, 13 Ed 1 c. 5 s. 8. But if the church remains still void at the end of the suit, then, whichever party the presentation is found to belong to, whether plaintiff or defendant, shall have a writ directed to the bishop *ad admittendum clericum* (F. N. B. 38,) reciting the judgment of the Court, and ordering him to admit and institute the clerk of the prevailing party; and if upon this order he does not admit him, the patron may sue the bishop in a writ of *quare non amisit*, (F. N. B. 49.) and recover ample satisfaction in damages. 8 Bl. Com. 248, 250.

* But it is most advisable to bring it against all three; for, 1st. If the bishop be left out, and the suit be not determined till the six months are past, the bishop is entitled to present by lapse, as he is not a party to the suit; but if he be named, and there has been a disturbance before the action, no lapse can accrue till the right is determined. 2dly. If the patron be left out, and the writ be brought only against the bishop and the clerk, the suit is of no effect, and the writ shall abate, for the right of the patron is the principal question in the cause. 3dly. If the clerk be left out, and has received institution before the action brought (as is sometimes the case), the patron by this suit may recover his right of patronage, but not the present turn, for he cannot have judgment to remove the clerk, unless he be made a defendant and party to the suit, to hear what he can allege against it. For which reason as it is always safer to insert all three in the writ.

5. THE KING v. THE BISHOP OF LONDON, T. T. 1692, K. B. 2 Salk. 559.

Or the writ being quæ ad nostram donationem spectat, and the count quæ ad suam donationem spectat. jure prerogative. In a quare impedit the defendant prayedoyer of the writ, and pleaded in abatement that there was a variance between the writ and the count; the writ being quæ ad nostram donationem spectat, and the count quæ ad suam donationem spectat. jure prerogative. It was objected, on demurrer, that the title stated in the writ was a title in fee; but that in the count was only a title pro hac vice, sed non allocatur; for the precedents are so, and the writ is always general; and if the king has judgment by default and a writ to the bishop, this will not gain a general title to the crown, or become an usurpation.

Per Holt, C. J. Where the king has judgment by default in a quare impedit, he, as well as a subject, must, by suggestion on the roll, set forth his special title. A *respondeas ouster* was accordingly awarded.

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6. SEARLE v. LONG, T. T. 1677, C. P. 1 Mod. 248; S. C. 2 id. 24

The process in quare impedit is summons, attachment, and distress, and if the defendant do not appear in court and essoin, there shall be judgment for the plaintiff. In a quare impedit against two, they severally appeared and cast an essoin by turns, and idem dies was given to him who first appeared, &c. An attachment issued against them for not appearing at the day, and process was continued to the grand distress, which being returned and no appearance, judgment final was ordered to be entered, according to the statute of Marlbridge, cap. 12. A motion was made to discharge this rule because the defendants were not summoned either upon the attachment or great distress, and the sureties returned upon the process were nominal John Doe and Richard Roe; that if judgment final should be entered, there would be no remedy but by writ of deceit; and on such a writ the summoners and veyors are to be examined in court; but feigned persons cannot be examined, so that in fact it was an abuse of officers to return such names; that ignorance of the sheriff was the original cause of it, who, being to make returns, and finding the names of John Doe and Richard Roe set down in the books of the precedents as forms, followed those precedents exactly, and made their returns accordingly, and took no further care to return true summonses. *Per Cur.* The design of the statute of Marlbridge was to have process duly executed, and that cannot be accomplished without the tenants have due notice of it; for if the defendant does not appear upon the summons, an attachment issues against him, commanding the sheriff to seize his body, and to make him give sureties for his appearance; if he will not appear, then the grand distress is awarded to seize the thing in question; and if still he neglect to appear, judgment final is to be given, by which the question is forever concluded; and the result so conclusive, that the process must never be suffered to be changed into a matter of course. It is true that the defendant here had notice of the suit, but he had not such notice as the law entitles him to; and for his fourching in essoin, the law allows it him. Accordingly the judgment was set aside.

7. SEARLE v. LONG, T. T. 1676, C. P. 2 Mod. 264.

To entitle the plaintiff to judgment the process must have been regularly and duly served, [340] In quare impedit, it was objected that leaving due notice upon the summons was as much as was required; for the other writs are only to give the defendant time to plead, and therefore it was not necessary that notice should be given upon every one of the writs, for if once served it is enough. But the court was of opinion that the defendant not having appeared, nor cast an essoin, and judgment final being given, it was reasonable that all the process should be actually served, which would have been unnecessary if he had either appeared or essoined; and therefore the process not being duly served, the judgment was set aside. *Rast. Ent.* 217. And they held that the essoin of another defendant was nowise binding to the patron, because they may sever in pleading, and that judgment was likewise set aside.

8. STRODE v. THE BISHOP OF BATH AND WELLS, H. T. 1676, 1 Mod. 230.

In quare impedit, if the plaintiff allege that he was seised in fee of such a manor. In a quare impedit the plaintiff declared that Sir George Horner was seised in fee of the manor of Dowling, to which the advowson was appendant; that he presented I. S. who was admitted, instituted, &c.; and that afterwards he granted the next avoidance to the plaintiff, that I. S. died, and it belonged to him to present; and upon demurrer to this declaration it was objected that it was ill, because the plaintiff did not allege that Sir G. H. presented tem-

prote pacis. And it was admitted that such averment ought to be inserted where the plaintiff makes his title by presentation, but here the title is by being seised of the manor to which the advowson was appendant, and the difference is between advowson in gross and appendant. And *Per Cur*. When one shows a precedent right, and then alleges a presentation in pursuance of that right, as here the plaintiff does in Sir G. H. it need not be stated to be *tempore pacis*; otherwise where no title is alleged; there the presentation makes the title, or to which the advowson was appendant, he need not in stating the presentation, allege that it was tempore pacis.

9. REYNELL v. LONG, T. T. 1693, K. B. Carth. 315.

In *quare impedit* the plaintiff declared that A. his ancestor, was seised in fee of the vicarage of B. in gross, &c. and being so seised granted the next avoidance to E. who granted it over to F. and that the church becoming void by the death of the incumbent, the said F. presented J. N. who was admitted, &c. that afterwards A. by deed granted the said advowson to the trustees and their heirs to the use of A. for life; then of B. his son and heir, and the heirs male of his body; and for want of such issue, to the use of the heirs male of the body of B. And during the time of the troubles in 1659, the church became void, that one W. R. by usurpation presented T. S. who was put into possession by the persons then in authority, and was afterwards by the 12 Char. 2, confirmed in the said church for his life. That the church afterwards becoming void, it belonged to the plaintiff as heir in tail of B. to present. The defendants demurred, because the plaintiff had not pleaded the grant by A. to the trustees with *profert*, for that here the deed is necessary to make it a good grant, because without the deed the advowson would not pass. But it was resolved that the plaintiff ought not to be compelled to produce it. 1st. Because it does not belong to him who is only *cestui que trust*, but it belongs to the grantee; 2dly. Because he has no remedy in law to get possession of it; 3dly. He is merely by operation of law, and not in the *per*. In *quare impedit* by a *cestui que trust* a *profert* of the grant of the advowsons need not to be made.

10. REX v. JARVOIS, E. T. 1696, K. B. 5 Mod. 336.

Upon a trial at bar on a *quare impedit* for the church of R. setting forth that J. W. prior of the dissolved monastery of D. in the county of W. was seised of the advowson of the said church in gross as of fee, in right of the priory, and that he and the monastery, on the 29th of June in the 21 Hen. 8, granted the next presentation to R. B. and others, under their common seal; that by the statute made on the 4th of February in the 27 Hen. 8, the priory was dissolved, not being above the yearly value of 200l and that the possession thereof was given to the king and his heirs; that Henry VIII. died seised, and it afterwards came to Queen Mary, and then to Queen Elizabeth; that R. B. on the 14th August in the last year of Queen Mary granted the next presentation to Sir R. L. and E. L.; that Sir R. L. died and E. L. survived, and was sole possessed; that Queen Mary died seised of the advowson; and the church became void by the death of R. W.; and that E. L. presented K. S. who was instituted and inducted; that Queen Elizabeth died without issue, and the advowson of the said church descended to King James I. and derives a title through that King, and that the church being void, it belonged to him to present. The defendant pleaded that *beneficium verum est* that King James was seised of the advowson in gross as of fee *prout* in the declaration; but that he, by letters patent under the great seal dated the 11th of July in the 13th year of his reign, granted the same to Sir C. M. and E. S. and their heirs, the church being then full of the said H. S. that they on the 15th of July in the same year granted it to E. S. and his heirs; that E. S. afterwards levied a fine to Sir T. J. and declared the uses thereof to the cognizee and his heirs; that Sir T. J. on the 13th March in the fourth of Charles I. granted the next presentation to P. W.; that the church became void by the death of H. S. and that P. W. presented T. W. who was instituted and inducted; that Sir T. J. died seised, and the advowson did descend to Sir T. J. his son and heir, and that the church became void by the death of P. W.; that he thereupon presented J. H. who was instituted and inducted; that Sir T. J. died seised, and the said advowson descended to the defendant, being his son and heir; and that the church being An advowson, though confessed in the pleadings to have once been vested in the crown, must not withstand being proved at the trial that it was so. [341]

void by the death of J. H. he presented the defendant H. thereunto; who was instituted and inducted, and traversed that King James died seised of the advowson aforesaid modo et forma, prout Attorn' General' præd' dum resgi nunc per narrationem suam præd' superius allegavit protestando; that Sir T. J. deceased and the defendant Jarvois were successively, for the space of 60 years and more before the writ brought, seised of the advowson in gross as of fee, and that H. S. died about 60 years before the writ brought; for plea saith that *bene et verum est* that King James was seised and derived a title to the defendant Jarvois; *absque hoc* that the church was void by the death of H. S. The question to be determined was, whether the defendant should give evidence, and show how this advowson came out of the crown; for having alleged that *bene et verum est* that King James was seised and derived his title by a grant from the king, and having traversed that the king died seised, &c. he ought to produce his grant, and show in what manner it was derived from the crown; for the seisin of the king being confessed in the plea, ex hoc sequitur that he died seised. But the Court, notwithstanding the admission in the plea, thought the plaintiff ought to have given some evidence that the advowson had at one time been vested in the crown. It was then contended for the defendant that he need not show a precedent grant, because this made by the commissioners was sufficient; for it must be presumed that the commissioners did pursue their authority; and the possession having been in the defendant and his ancestor for 60 years and upwards, and no presentation since from the crown, it ought never to be intended that those commissioners exceeded their power. And in this opinion the Court concurred, observing, that since the plaintiff could not produce any evidence that the king did present to this living since the dissolution of the priory, and therefore it is possible that the Prior might grant away this advowson before the statute of 37 Hen. 8, c. 8, and it might be that evidence was given of such a grant to the commissioners. These letters patent were granted to commissioners to quiet the possession of the people, whether the crown had any pretence or not. Plaintiff nonsuited. See 27 Hen. 8, c. 1; Carth. 351; Fitz. 308; Comb. 308; Skin. 659.

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A grant of
advowson
by crown
commission
ers will be
presumed
to be consis
tent with
their author
ity.

11. THE KING v. THE BISHOP OF HEREFORD, H. T. 1720, C. P. 1 Co. Rep. 358.

The bishop
pleaded
that he
claimed no
thing but as
ordinary,
and it was
holden bad
for want of
alleging no
tice of the
refusal.

In a quare impedit for the presentation to the vicarage of Aymstrey, in the county of Hereford; the bishop pleaded that the vicarage was within the diocese, and that he claimed nothing but as ordinary of the said church; that the king, by letters patent under the great seal, presented George Herbert to be instituted, super quo idem episcopus ut ecclesiæ præd' ordin-ar' præd' George Herbert sic presentat de habilitat' et idoneitat' sua tam de moribus quam scientia in hac parte secundum leges ecclesiasticas adtunc et ibidem examinavit ut de jure debuit et super hujusmodi examination' idem episcopus adtunc et ibidem invenit et per sacrum diversar' personar' fidie dign' sibi manifesto appavuit quod præd' George Herbert tempore præsentation præd' fact' et diversis annis tunc ult' elapsis ebrietati datus Anglice a common drunkard; et communis de jurat Anglice, a common sweaver; ac ea occasion', per legem sanctæ ecclesiæ fore inhabilem et personam minime idoneam fore admiss' ad aliquod beneficium cum cura animar', per quod idem Episcopus ut ecclesiæ ill' ordin-ar' recusavit admittere præd' George Herbert ad vicarium ecclesiæ præd' prout ei bene licuit et hoc parat, &c. To this plea the attorney-general demurred; and the bishop joined in demurrer; and the following exceptions were taken. First. That the bishop says quod ipse nihil clamat' in eadem ecclesia, whereas it ought to be in eadem vicar'. Sed non allocatur, for he adds, nisi admission', institution' et induction', vicar' ad ecclesiam præd'; for though the word ecclesia imports the rectory, and quare impedit presentare ad ecclesiam is not good for a presentation to a vicarage; F. N. B. 326; yet the reference here is to the ordinary, who if he is ordinary of the rectory, is also ordinary of the vicarage representative derived therefrom; and so are the precedents; 2 Brown, 225, 226; Rast. 524. Secondly. There is no certain averment that he was a common drunkard, sed non allocatur; for ebriat' dat' with an Anglice is sufficient. Thirdly. The averment that he

was it not certain, but only *quod super examin' Episcopus invenit et per scar'um personar' fide dign' manifeste sibi apparuit quod fuit, &c.* *Sed non allocatur;* for Dyer, 368; 2 Rol. 591; it was allowed to be good where the certificate of the ordinary said *diligentum et celerem fieri fecimus inq' per quam luculent comperimus et invenimus, quod, &c.* Fourthly. That the bishop does not show that he gave notice of the refusal; and it was argued that there is a distinction between the refusal of a clerk of a common person and the clerk of a king. In the case of a common person, lapse incurs if he does not present within six months; and therefore notice is necessary. *Hern, Plead. 601; Town's Tables, 222; Co. Ent. 520.* And on this ground the plea was held bad.* See *Hele v. Bishop of Exeter*, 2 Salk. 539. [343]

12. *THE KING v. THE BISHOP OF MEATH*, E. T. 1714, K. B. 10 Mod. 308. In error brought upon a judgment in *quare impedit* given in Ireland, it was insisted that the plaintiff ought to have set forth both seisin and vacancy, but that here he had failed in both. 1st. As to the seisin, the declaration alleged, *seisitus fuit et in advocacione ecclesie;* here the *et* couples nothing, and *seisitus* refers to nothing. 2dly. As to vacancy; the record stated, *ecclesie predict' vacavit per cessionem, &c.* Now this is pleading a consequence without setting forth the act of which this is a consequence; it ought to have been pleaded that the parson was made a bishop, or advanced to a living incompatible, &c. as the fact was, *per quod ecclesie prae'd' vacavit.* 3d. Exception taken to the record was, that the conclusion was, *et hoc paratus est verificare*, instead of *inde producit sectam*, and so no suit before the court. This is not mere matter of form. But it was answered that the word *et* might be left out, or transposed thus, *et de facto et de jure.* And as to the vacancy, and the *paratus verificare*, advantage might possibly have been taken of them by demurrer, which advantage is lost by taking issue. *Per Cur.* The objection of the seisin is the strongest, for it is nonsense at present, and every thing may be cured by leaving out and putting in. Possibly in transcribing the record, *de* was omitted: and if the fact be so, it may be set right by a *certiorari, &c.*; and *de et in advocacione* would be well. As to the omission of the *inde producit sectam*, this would have excused the defendant in not answering, but in fact he has answered it. And as to the objection about pleading the vacancy, it ought to have been pleaded, as above stated; but the vacancy, however, is admitted by pleading a presentment under it. In pleading a vacancy, it ought to be stated that the parson was made a bishop, or advanced to a living incompatible, &c. per quod ecclesie prae'd' vacavit. The omission *inde producit sectam* may excuse the defendant in not answering, but is not assignable for error after he has answered. [344]

13. *REX v. THE BISHOP OF LLANDAFF*, H. T. 1734, K. B. 2 Stra. 1006. A writ of error was brought on a judgment in favour of his majesty in the Court of Grand Sessions in Wales, in a *quare impedit* by the king against the Bishop of Llandaff and others, for the church of St. Andrew, in the county of Glamorgan, and after general errors assigned, it was said, *Per Cur.* In this case there are three principal points to be considered. 1st. Whether it is necessary to allege a presentation. 2d. If necessary, whether the *commendam* amounts to a presentation, or excuses the want of alleging one. And 3dly. Whether the verdict which finds the late queen was seized in fee as of an advowson in gross cures such defect. We are unanimously of opinion that it was necessary to allege a presentation, and the *commendam* will not be equivalent to that averment; but we are never of opinion that the verdict aided the want of that allegation. Accordingly the judgment must be affirmed. It is generally necessary for the crown to allege a presentation in a *quare impedit* as well as a subject; a *commendam retinere* does not amount to one. But when the verdict finds that the king was seized in fee ut de uno grosso it cures the want of the allegation.

14. *REX v. THE ARCH. OF ARDM., & WHALEY*, T. T. 1726, K. B. 2 Stra. 837. Error on a judgment in B. R. in Ireland, on a *quare impedit* brought by the crown against the Archbishop of Ardmagh, and Nathaniel Whaley, clerk. The declaration stated, that M. B. late Archbishop of Ardmagh, was seized in fee ut de uno grosso it cures the want of the allegation.

* Lord Coke, in his second Institute, p. 682, says, "If the cause of refusal be for default of learning, or that he is a heretic, schismatic, or the like, belonging to the knowledge of ecclesiastical law, there the bishop must give notice thereof to the patron; but if the cause be temporal, as a felon, or homicide, or other temporal crime; or if the disability grow by any act of parliament, or other temporal law, there no notice ought to be given, unless notice be prescribed to be given thereby." But Dr. Burn, in the 1st volume of his Ecclesiastical Law, p. 142, declares that in all cases it is fair and equitable to give notice to the patron of the refusal, whatever the cause may be, for it is very possible that the person presented may be many ways unfit, and the patron not know it.

The declaration having set forth that B., the late archbishop, was seized as of fee in right of his archbishopric, of the advowson of the church of A. &c. &c. the archbishop in his plea admits this seizure, and a vacancy by promotion, as alleged in the declaration, but insists that the crown by patent, granted to D. the dean of A. with all its rights, members, &c. by virtue

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whereof he was possessed of the church of A. as a member of the deanery &c.; this is ill, as it neither shows a presentation, or that the church is a member of the deanery.

Subscribing to the articles need not be alleged in the plea nor in the declaration.

Three objections were taken to the count: 1st. That it was not alleged

as of fee, in right of his archbishopric, of the advowson of the church of Ardmagh; and, being so seized, he collated B. V. and was admitted, and afterwards made bishop of L. and F. by King William and Queen Mary, whereby it belonged to the crown to present on such promotion; that during the vacancy, Queen Mary, and then King William, and then Queen Anne died; and then it belonged to King George the First to present, but the Archbishop and Whaley obstructed. The archbishop prayed oyer of the writ, and pleaded, that true it is, that M. B. was seized in right of his archbishopric, and that the church became vacant by the promotion of B. V. *unde* it belonged to the crown to present for that turn; but then, he says, that King William and Queen Mary, by letters patent, 23d Feb. third of their reign, granted to P. D. the deanery of Ardmagh, with all its rights, by virtue whereof he was possessed of the church of Ardmagh, as a member of the deanery, and enjoyed the same to his death. That N. B. died, and N. M. succeeded him, and became seized of the advowson, and upon his death it came to T. L. in whose time B. V., the promoter, died. That D. is since dead; by which the right of presenting was in T. L. who, 5th of May, 1722, presented the other defendant, Whaley, who is now incumbent. The defendant Whaley likewise prayed oyer of the writ, and pleaded, that he is a parson *imparsonnee* of collation of the late archbishop, that the church did become vacant by the promotion of B. V. and that the crown presented D. who was admitted, instituted, and inducted; then deduced title from M. B. to T. L., as in the archbishop's plea, with the death of B. V. and says, that D. died 8th of March, 1721, and T. L., 5th of May following, presented him, upon which he was put into possession of the living, before bringing the king's writ, and concludes with a traverse, that the church is still vacant by the promotion of V. as is alleged in the declaration.

Demurrer to the archbishop's plea for cause that it is not averred in the plea that the church of Ardmagh was a member of the deanery, or enjoyed as such by V., or presented as such by King William and Queen Mary; and the archbishop joined in demurrer. Replication to Whaley's plea, that King William and Queen Mary did not present D. to the church of Ardmagh, concluded to the country. To this replication Whaley demurred generally; and after a joinder in demurrer and several continuances, judgment was given in the B. R. in Ireland, that the archbishop's plea was good, and that replication to Whaley's plea was insufficient *ideo defendentes eant inule sine die; &c.* On this judgment a writ of error was brought, the general errors assigned, *et in nullo est erratum* is pleaded. *Per Cur.* It is impossible to maintain the primates plea, which neither shows a presentation, or that the church was a member of the deanery; hence all the facts alleged in that plea are to be laid out of the case, not being admitted by the demurrer, because ill pleaded. As to Whaley's plea, it is a full confession and avoidance, without a traverse which for that reason being immaterial, might as such be passed over. It was afterwards objected that the traverse at the end of the incumbent's plea was material, because what went before could not, at all events, be a turn, since the presentee, for any thing that appeared, might not have subscribed to the articles; and cited 5 Co. Windsor's case, Winch. 13; 2 Cro. 650; Yelv. 115. *Sed per Curiam.* Then you are not parson *imparsonnee*, to be let in to controvert this; for you have not alleged a subscription of the articles, and it is as necessary in your plea as in the king's court, though the truth is it was never alleged in either.

15. THE GROCERS' COMPANY v. THE ARCHBISHOP OF CANTERBURY, T. T. 1771, 3 Wils. 214.

The declaration stated that the plaintiffs were seized in fee of the advowson of Allhallows, Honey-lane, in gross; that, on the 27th of March, 1663, they presented thereto Thomas Hutchinson, who was admitted, &c. That the Archbishop of Canterbury was seized in fee of the advowson of St. Mary-le-bow, in gross, in right of his archbishopric, and that William Juxon, then archbishop, on the 10th of Oct. 1662, collated it on George Smallwood. That the same archbishop was seized of the advowson of St. Pancras, So-

per Lane, in fee gross, in like right; and 10th of June, 1662, collated it on Samuel Dillingham. That the three churches were destroyed by fire; and thereupon, by a statute of 22 C. 2. it was enacted that the parishes of St. Mary-le-Bow, St. Pancras, Soper-lane, and Allhallows, Honey-lane, should be united, and that Bow Church should be the parish church of the three parishes. That the respective patrons of the said churches, so united should and might present by turns to that church only; the first presentation to be made by the patron of such churches, the endowments whereof were of the greatest value, by virtue whereof the archbishop and plaintiffs became seised of the advowson of Bow Church, and the other two in fee, as one in gross, and entitled to present to Bow Church as aforesaid. That after the statute, the church of Bow became vacant by the death of George Smallwood, and Archbishop Sancroft, on the 23d of Sept. 1697, collated Timothy Pullen. That the church became vacant by the death of Pullen and Archbishop Tillotson, on the 21st Nov. 1693, as in his second turn, collated Samul Bradford, who was afterwards created Bishop of Rochester, and the church thereby became vacant, whereby King Geo. 1. by his prerogative, on the 10th of July, 1720, presented Doctor Samuel to Bow Church, with the other two churches, who was admitted, &c. and was created Bishop of St. Asaph; whereupon King Geo. 2. by his prerogative, on the 16th of April, 1744, presented Dr. Thomas Newton in like manner, who was admitted, &c. That the church became vacant by the free resignation of Dr. Newton, and is yet void, by reason whereof it belongs to the plaintiffs in their turn, being the third, to present a fit person; but the defendants hinder them. The archbishop demurs generally; the other defendant, Backhouse, pleads that he is a parson of the said church, on the presentation of the archbishop; that the plaintiffs ought not to have their action. He admits plaintiffs were seised of Allhallows, Honey-lane, and presented Hutchinson; that the archbishop was seised of Bow Church, and collated Smallwood; that the archbishop was seised of St. Pancras. Soper-lane, and collated Dillingham; that three churches were burnt, and that by the statute it was enacted as in the declaration, and that thereupon the archbishop and plaintiffs became seised and entitled to present as in the declaration; and Bow Church became, by the death of Smallwood, as in the declaration. But he further says, that Bow Church was of greater value than either of the other two churches; and that the church of Allhallows, Honey-lane, was of greater value than St. Pancras, Soper-lane; that is to say, Bow Church, 33l. 12s. 3 1-2d. Allhallows, 19l. 13s. 9d. St. Pancras, 13l. 6s. 8d. and no more per annum respectively. By reason whereof the archbishop for the time being became entitled to present to Bow Church in the first turn, the plaintiff in the second turn, and the archbishop in the third turn. That true it is, that Archbishop Sancroft, on the death of Smallwood, did in his first turn collate Pullen, and that the church became vacant by the death of Pullen; but that thereupon, according to the said statute, it belonged to plaintiffs to present in their second turn, but that Archbishop Tillotson collated Bradford by usurpation. That Bradford, being in the said church was created Bishop of Rochester; and King George 1st, 11th July, 1720, by his prerogative, presented Doctor Lisle, who was admitted, &c. And Doctor Lisle being so clerk of the said church was created Bishop of St. Asaph; and King George 2. by his prerogative, 16th of April, 1744, presented Doctor Newton, who was admitted, &c. and afterwards the church became vacant by the resignation of Doctor Newton, by reason whereof it belonged to the presented archbishop to present in his third turn, and that thereupon he collated the defendant Backhouse, before the issuing of the writ of the plaintiffs, by reason whereof Backhouse is still parson imparsonée, &c. of the church, and this wherefore, &c. Plaintiffs join in demurrer with the archbishop, and pray judgment and a writ to the archbishop.

The plaintiffs, as to the plea of Backhouse, say they ought not to be barred, because, protesting that Allhallows, Honey-lane, was not at the time of making the said statute, of greater value than St. Pancras, protesting also

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2d. That
plaintiffs
had not
shown any
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title to the
third turn;
3d. That it
was not
shown that
the turn
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that Archbishop Tillotson did not usurp upon the plaintiffs. For replication the plaintiffs say, that the church became vacant by the resignation of Dr. Newton, and it belongs to the plaintiffs to the present in their third turn; yet the bishop and defendant hinder them. Without this, that it belonged to plaintiffs to present at the second turn, when the church became vacant by the death of Pullen, as Backhouse has alleged in his plea. The defendant Backhouse demurs to the replication, and shows for special cause that the plaintiffs have not traversed any matter of fact alleged in the plea, but having traversed matter of law, joinder in demurrer. Three objections were made to the count: 1st. That it was not alleged that the plaintiffs were seised of the advowson to present as in their third turn. 2d. That the rota or order of the turns of presentation, depending upon the yearly value of the endowments of the three churches respectively, at the time of making the statute of 22 C. 2. whose respective values of the churches ought to have been stated, but the same not being stated, the plaintiffs have not shewn any title to the third turn, which they claim. 3d. That supposing the plaintiffs are entitled to the third turn, yet the defendants say, it appears by the count that this is not the third turn, for the two prerogative presentations shall go for turns; so that this is the second turn in the second rota. *Per Cur.* In answer to the first objection, we are all of opinion, that it is well and sufficiently alleged in the count that the plaintiffs were seised of the advowson to present as in their third turn, for it is alleged that, before the destruction of the three churches by fire, they were seised of the advowson of the church of Allhallows, Honey-lane, and presented Hutchinson thereto, who was admitted, &c. And it is further alleged, that, after the fire of London, by virtue of the act of parliament, the archbishop, in the right of the archbishopric, and the wardens and commonalty, became seised of the church of St. Mary-le-Bow, with the churches of St. Pancras, Soper-lane, and Allhallows, Honey-lane, as of one ingross by itself as of fee and right, and were entitled to present to the church of St. Mary-le Bow, in turns, according to the acts of parliament; and the presentations, as far as turns have gone, have been made under the act, so that in our opinion this objection has no weight. As to the second objection we are all of opinion, that although the yearly value of the endowments of the three churches respectively, at the time of making the act, are not stated in the count, yet by what appears and is alleged therein, we must take it by necessary intendment, that the endowments of the archbishop's two churches of St. Mary-le-Bow and St. Pancras, Soper-lane, were each of greater yearly value than the church of Allhallows, Honey-lane; for it is expressly alleged therein, that, after the making of the act, the church of St. Mary-le-Bow became vacant by the death of Smallwood; by reason whereof Archbishop

[348] Sancroft, as in his first turn, collated the church on Pullen; that afterwards the church became vacant by the death of Pullen, whereupon Archbishop Tillotson, as in his second turn, collated to the church on Bradford, so that we must necessarily intend that these two archbishops collated according to their right under the act of parliament, and cannot presume or adjudge that either of them collated wrongfully by usurpation, or contrary to the statute; so that we think the second objection has no weight. As to the third objection we are all of opinion, that the prerogative presentations cannot be considered as turns, or deprive a patron of his turn; for a prerogative presentation upon the promotion of an incumbent to a bishopric is by an act of law, which cannot operate to the injury of a third person, for *constructio et actus legis nulli facit injuriam*. 1 Inst. 148. 183. a. b.; 2 Inst. 287. See Dyer. 228. note in the margin. In fact, this is the fifth vacancy since the making the act; but with respect to the patrons, it is but the third opening or avoidance, wherein the presentation of a patron, having the third turn, could take place. We think the presentation of the crown, upon a promotion of an incumbent, doth not supply a turn. We will now consider the incumbent's plea; he undertakes thereby to make out a better title to himself; he admits the first part of the count, before the destruction of the churches, and all the presentations by the archbishop and the crown stated therein; he ad-

mits the act of parliament, but alleges that the yearly endowments of Bow Church was of the greatest value; that those of Allhallows, Honey-lane, the plaintiff's church, were of the second value; and those of St. Pancras, Soper-lane, of the least value; and that it belonged to the plaintiffs to present in their second turn, according to the statute, but that Archbishop Tillotson usurped upon them by collating Bradford; but we say the statute has not set out the turns; it only says that the first presentation is to be made by the patron of such of the said churches, the endowments whereof were of the greatest yearly value, and is silent as to the second and third turns, to which two turns the plaintiffs and the archbishops are left to agree to present in what order or turn they should think fit; indeed, if the statute had set out the rota or order of presentation to all the three turns, then it would have been necessary to have determined whether Archbishop Tillotson collated Bradford by usurpation or not; but that not being chalked out by the act, we must take it to be true, that the parties have agreed to present as alleged in the declaration, viz. the archbishop in the first and second turn, and the company of grocers in the third turn. After the archbishops have had and enjoyed the right to present to the first and second turns, for a hundred years and upwards, is this Court to presume that they have acted by wrong or right. Surely by right, and by agreement of the parties. The long acquiescence is evidence of an agreement to present in the order and rotation alleged in the count. We are of opinion, the defendant, the incumbent, has not made out any title to himself by his plea. We are now, lastly, to consider the plaintiff's replication, and the demurrer thereto; it is a general rule that whoever makes the first fault in pleading shall have judgment against him. We think the defendant Backhouse has made out no title in his plea, and therefore judgment must be for the plaintiffs. The plaintiffs have done right in not setting out in the declaration the respective yearly values of the endowments of the three churches; and have also acted correctly in alleging that the third turn belongs to them. As to the traverse, we think matters of law, or rather matters of right, as this is, resulting from facts, are traversable; whether one obtained a church by simony is traversable. Rast. Ent. 232, a. Whether one seised in fee or in tail is traversable. Yelv. 140, Ewer v. Moile. It is the common averment in a *quære impedit* "that it belonged to A. B. to present to the church, when the same became vacant," which may, or rather must, depend upon both law and facts, and the same is traversable. Judgment for the plaintiffs, and a writ to the bishop to admit the plaintiff's clerk, per totam Curiam.

16. **POWELL v. MILBURN**, M. T. 1772, C. P. 3 Wils. 355; S. C. 2 Bla. 851. In an action by a priest to try his right to a donative church with cure of souls, the questions were, first, right to a donative church with the care of souls it is not necessary for the plaintiff to prove that he has complied with the requisites required by the 13 Eliz. c. 12, and 14. C. 2. c. 4, since the nomination to the donative; nor had any licence from the Bishop of Durham to preach or officiate in the church of C. The general question therefore in this case was whether the plaintiff was in a situation to maintain the present action. And under this general question, the two particular propositions were raised. *Per Cur.* If it were necessary for the Court to give judgment upon this first

point, the case in 3 Lev. 82, of *Carver v. Pinkney*, shows that a stipendiary priest, or a donative, is within the statutes of simony and of conformity, and in that opinion we fully concur, assuming then, that an incumbent of a donative church is within the statutes of the 13th Eliz. and 13th & 14th C. 2, and obliged to comply with and perform the requisites therein; the second question upon which the Court now give their judgment, is, whether it was or was not necessary for the plaintiff to have proved upon the trial of this cause that he had conformed with those requisitions. It may be proper to consider the nature of the present action, which is an action for money had and received to the use of the plaintiff. It has been introduced of late years to try questions of this kind, as a sort of fictitious action, and in the present case this is brought to try who had the right to nominate to the donative church of C. whether W. I. in right of his wife, or the crown, or any other person had this privilege; but there was no fact proposed to be tried relating to the question, whether the plaintiff had performed the requisites in the before mentioned statutes. We are all of opinion, that in this action it was not necessary for the plaintiff to enter into any such proof; and we must presume that he conformed to all those requisites, as no evidence has been offered to the contrary; for although it may be said, that this is obliging the defendant to prove a negative, yet he might easily have brought these requisites into question, because they are generally entered in public registers; and if no such entries could have been found respecting the plaintiff, that might have induced a suspicion that he had not performed the requisites, and might be fit for the consideration of a jury. However, it appears by the case stated, that the plaintiff has complied with the most material of all requisites; that he was in priest's orders, subscribed the articles, &c. and therefore upon the whole we think he is well entitled to this donative. See 1 Keb. 720; 1 Sid. 220; 3 Lev. 82; 14 Hen. 4, 11, b, 1 Roll. Rep. 83.

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17. *THRALE v. THE BISHOP OF LONDON*, E. T. 1789, K. B. 1 H. Bl. 376.

The plaintiff having stated his title in the declaration, the defendant pleaded his own title, in bar, in deducing which several immaterial points are alleged; the plaintiff in the replication states an essential matter, which if true, would defeat the plaintiff's claim, but did it by way of inducement to traverse one of the immaterial points, with which the plaintiff traversed the

The plaintiffs declared as executors and devisees in trust and claimed to be entitled to the advowson in question under the will of Caleb Lomax, whom the declaration stated to have been seised in fee of the advowson, and to have presented on a former avoidance. To the declaration the defendant, Edward Barker, pleaded four pleas. On the second and third, issue was joined; the first and fourth were the subject of the argument before the Court. The first plea stated a title to advowson in one Ellis, who presented in 1680; that Ellis conveyed it to Killigrew; that Killigrew devised it to his wife Lucy for her life; and that the reversion on the death of Killigrew descended to his three daughters in coparcenary. It then stated an avoidance during the life of Lucy, the widow, and a presentation by Lomax, the father of the testator, usurping on Lucy. That the living again became vacant, after the death of Lucy, by the resignation of the then incumbent, Romney; and that the crown, by usurpation on the right of the elder coparcener, presented again the same clerk. It then stated an avoidance by that presentee, and another presentation on that avoidance by Lomax, usurping upon the right of the second coparcener. A title was then deduced at considerable length to the defendant from the second and third coparcener, concluding with a claim to present on the existing vacancy in the third turn. To this plea the replication stated a purchase by Lomax of the right of Lucy Killigrew, the widow and a presentation of the advowson made by him during the life of Lucy, on an avoidance then happening. A fine was then set forth, levied by the three coparceners of the advowson, and a conveyance to Lomax under that fine. Having stated this title in behalf of the plaintiffs, in answer to the plea, the replication concluded that the resignation of Romney was fraudulent and without notice, and traversed that upon that resignation it belonged to the eldest coparcener to present. To this replication there was a rejoinder by the defendant, in which the defendant traversed the fine; and to that rejoinder there was a special demurrer, alleging as a defect that there was a traverse taken upon a traverse.

Per Cur. It is incumbent on the plaintiff to show that their replication

was good, and that the traverse with which it concludes was a material traverse. For if the replication be not good, and the traverse material, the consequence will be, that the plea is a good bar to the title which the plaintiffs have set up in their declaration. It is an established rule that the plaintiff must recover on the strength of his own title. That rule has not been controverted; but it has been argued on the part of the plaintiff that a defect in the defendant's title will leave the plaintiff's in possession of the title upon which they have declared unanswered, and that the defendant, when he pleads and sets forth a title in himself, puts himself in the situation of a plaintiff. This argument would be well founded if the plea which the plaintiff put in was bad on the face of it, since in that case the first error in pleading would have been committed by the defendant, and the general title which the plaintiffs have shown in their declaration would remain uncontroverted. But in the case before us it is not so; the plea is on the face of it a good plea; there is no objection to the manner in which the defendant has stated his title. The plaintiff must, therefore, show a more particular title than they have set forth in the declaration, and they find themselves under the necessity of abandoning the general title on which they declared, and of showing a better title than that which the defendant has stated in his plea. Accordingly they do so; admitting the right of Killigrew, who is the ancestor under whom the defendant claims, the plaintiffs claim by virtue of a fine levied by all the coparceners. This, no doubt, is a full and complete answer to the title set out in the plea. But then the plaintiff, instead of putting any matter in issue on that title, instead of drawing any conclusion on which there can be an issue, concludes with suggesting that the resignation of Romney was fraudulent, and that the usurpation for that turn was not an usurpation on the right of the eldest coparcener, for that is distinctly the effect of the traverse. A great many cases were cited to show that this traverse was material, and we admit that is the point to be proved. But it cannot be material in the abstract; it is material or not, *quoad* the right to support which issue is taken. Now the right insisted on by the plaintiffs in their replication is a right under the title of Killigrew to the advowson, by a conveyance from the three coparceners; and to that right so set out, whether the avoidance in question is in the first, second, or third turn, is of no sort of consequence. There is no question of turn with respect to a person who claims in himself a title to the whole advowson; and the irrelevance of the traverse taken by the plaintiffs to the title set out, cannot appear more strongly than by comparing this case with the case 3 Wils. 214. which was cited in the argument, to show the sufficiency of the traverse on the part of the plaintiffs. But in the present case, admitting, what in all probability was true, that the right was not in the coparceners, it would not tend to show that the plaintiff had derived a right from Killigrew, who, by confession of the pleadings, was clearly at one time entitled to the right, which descended to coparceners, and which, unless it was passed by them, would still remain in them to be exercised according to the nature of their interest. It is said, however, that the defendant has rejoined informally; that he ought to have demurred to the replication. But wherever a traverse is immaterial, the other party may pass it by, and put in issue a more material part. However, it is not necessary to consider whether it were better for the defendant to have demurred to the replication, or to have rejoined as he has done, because, if the traverse be bad, the replication is bad, and the defendant is entitled to judgment on the plaintiffs replication. We doubt, however, whether, it would have been safe for the defendant to have done that which would have permitted the averment to stand confessed of the fine levied by the three coparceners to the use of Lomax in fee. If that be a substantive allegation, he has met it; if it be not, then the plaintiffs having admitted the title in Killigrew, and the descent from him, having shown nothing to avoid it, or to support any right in themselves, and the replication is no answer to the plea. The fourth plea states the right correctly and truly, and is also agreeable to a former judgment of this Court on the same right of the same parties. There is but one objection made to it, namely, that it is pleaded that the coparceners

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did not agree to present, and therefore that on the first avoidance of the presentation belonged to the eldest. The argument is, that in the language of many books and some pleadings, the right of presenting by turns is said to arise when coparceners cannot agree, and many authorities have been quoted to prove this position. It is also laid down in Bro. tit. Present al Eglise; 19 Fitz. Nat. Breve Qua. Imp.; 81 Co. Lit. 166. b.; Doctor and Student, b. 2. c. 30; and is clear law, that the first presentation in such case of mere right belongs to the eldest, descends to her issue, goes to her husband by the curtesy, and passes by her grant. No authority has been cited to show it to be bad pleading to state that they did not agree; on the contrary, in the case of this very advowson, the phrase in the pleadings is distinctly that they "did not agree;" and the Court, in giving judgment, reasoned upon it as being precisely synonymous with "could not agree." Besides this, and a plea in bar, certainty to a common intent is sufficient. On this ground, therefore, the fourth plea is well pleaded, and on that also there must be judgment for the defendant.

(c) *Damages,* judgment,† and costs.*

1. *HOLT v. HALLAND*, T. T. 1681, C. P. 3 Lev. 59.

In a *quare impedit* the plaintiff was not formerly entitled to damages where the church remains void.

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But semb. that he is now entitled to recover them.‡

In a *quare impedit*, there was a demurrer and an issue. The plaintiff had a verdict; and the jury who tried the issue found the value of the church, and that it is yet vacant, and assessed damages for the half year. The plaintiff had judgment likewise upon the demurrer. It was moved that the church being yet vacant, and that the patron might have the fruit of his presentation, he ought not to recover damages for the value of the half year; and the prothonotaries reported that it was the constant course, for the plaintiff not to recover damages for the half year where the church remains void; and though the jury tax damages, yet in such cases they enter a remittitur of the damages where the church remains void. See Br. *Quare Impedit*, pl. 131. cites 13 E. 4. 3; 21 Hen. 6. 45; 22 H. 6. 28; Com. Dig. *Damages*, A. 2; 2 Inst. 362.

2. *BISHOP OF EXETER v. FREAKE*, H. T. 1697, C. P. 1 Lutw. 901.

In *quare impedit*, to present the vicarage of B. the plaintiff set forth that E. C. was seized of the rectory of B. to which the vicarage belonged, and that the said E. C. presented one S. and then conveyed the rectory to the plaintiff F. and other trustees, and their heirs, to the use of the said E. C. and her heirs, till marriage had between her and C. D. and remainder to the use of the plaintiffs for 500 years, for raising 4000*l.* &c.; that the marriage was solemnized, and the plaintiffs possessed, &c.; that the vicarage became void by the death of S. and this it belonged to them to present. The bishop claimed nothing but as ordinary. H. the incumbent, pleaded that King James I. was seized of the said rectory in fee, and that it being void by the death

* Prior to the 13 Ed. 1, the plaintiff in *quare impedit* was not entitled to recover damages, but any profit the patron might obtain, though the verdict should savour of simony; and this is the reason that the king, in a *quare impedit*, recovers no damages, because he could recover none by common law; and the king is not within the provisions of the act conferring this right, Boswell's case, 6 Rep. 51; 2 Inst. 362; Co. Litt. 176; and see further as to the king's right, Br. *Damages*, pl. 15; id. *Prerogative*, pl. 18; Fitz. *Quare Impedit*, 161; Jenk. 281, pl. 9; cites Brooke's case, 22 H. 8, 17. The statute 13 Ed. 1, c. 5, s. 3, enacts, that from henceforth in writs of *quare impedit* and *darrien presentment*, damages shall be awarded that is, to wit, if the time of six months pass by the disturbance of any, so that the bishop do confer to the church, and the very patron lose his presentation for that time, damages shall be awarded for two years' value of the church. And if the six months be not passed, but the presentment be deraigned within the said time, then the damages shall be awarded to the half years' value of the church. And if the disturber be not able to render damages, he shall in the first case have imprisonment of two years, and in the other of half a year.

† By *quare impedit* a man shall not recover the advowson but the presentment; but if he has execution, all others besides the incumbent are thereby out of possession. If a man recover in *quare impedit*, and dies, his heir shall not have execution, and therefore it is not a real action.

‡ A man shall recover damages in *quare impedit* when he was never disturbed; per Newton, Br. *Quare Impedit*, pl. 83; cites 22 H. 6, 25. As where I present, and my clerk is admitted, and J. N. admitted, and S. H. admitted, and J. N. brings *quare impedit* against me, and is nonsuited, after issue I shall recover damages.

of L. he presented one Solebar, and so derived a descent down to King William, &c.; *absque hoc*, that E. C. was seized in fee; there was judgment against the bishop, and the plaintiff had a verdict; and the jury further found, that the vicarage was full of the defendant H. ex-presentative of the king, and that it was afterwards void, on the 25th of September, 1697, by the death of Sainthill, the last incumbent; and that on the 20th May, 10 W. 3. the plaintiffs brought a *quare impedit* against the bishop and the defendant, and that the vicarage was of the yearly value of 60*l. ultra*; and thereupon the plaintiffs prayed judgment according to the statute, and a writ to the bishop, to remove the defendant H. and to admit *idoneam personam* at the presentation of the plaintiffs, and damages to the value of the vicarage of the church for half a year, and had judgment accordingly; and a writ of error was afterwards brought, and the plaintiff in error nonsuited.

Where several plead the same plea, and one die, and issue is found for the incumbent, [354] bent, the latter is not entitled to damages.*

3. PRATT v. RUTLEIS. T. T. 1760. K. B. 12 Mod. 547.

By the statute of Westminster, c. 5. damages are given in a *quare impedit*, yet if a *quare impedit* be brought against a patron and his clerk, and they both plead the same plea in bar, and the patron dies, and the plea be found for the incumbent, he shall have no damages, because we can have no judgment; here the judgment for a return being superseded, there can be no damages. See S. P. 2 Inst. 362; Bro. Damages, pl. 162; cites 9 H. 6. 30; Br. *Quare Impedit*, pl. 6.

4. TULLET v. LINFIELD. H. T. 1764. K. B. 3 Burr. 1455.

On a *quare impedit*, six months are understood to be six calendar months. But that is because it is manifest by the words of the stat. Ed. 1. (H. 2.) c. 5. that by six months half a year is there meant; the words are, "If he recover his presentation within six months, damages shall be given to half a year's value only." Although the defendant have judgment on demurrer on a *quare impedit*, he is not entitled to costs under stat. 8 & 9. W. 3 c. 11.

On a *quare impedit*, the six months are understood to be six calendar months.

5. THRALE & OTHERS v. THE BISHOP OF LONDON. M. T. 1790. C. P. 1 H. Bl. 376.

Judgment having been given for the defendant on demurrer in *quare impedit*, it was moved on the part of the plaintiffs that the prothonotary might be restrained from taxing costs to the defendant, on the ground, that as the plaintiff would not have been entitled to costs if he had succeeded, neither has the defendant, the right being mutual. That the statute of Gloucester, 6 E. 1. c. 1. gives costs only where damages were recoverable at common law; but as there were no damages at common law in *quare impedit*, costs were not given by that statute. So also where double or treble damages were created, costs were not increased by that statute in the same proportion, unless in cases where single damages might have been recovered at common law; 2 Inst. 289. And though the stat. Westminster 2. 13 Ed. 1. 11. gives damages in *quare impedit* and *darrien presentment*, yet as those damages did not accrue at common law, the stat. Gloucester did not operate to give costs in those actions; 2 Inst. 362; Pitsford's case. 10 Co. 116. *Per Cur.* Taking the construction of the statute 8 & 9 W. & M. and the cases cited into full consideration, we are clearly of opinion, that

A defendant obtaining judgment on demurrer in *quare impedit* is not entitled to costs.†

* But per Newton in *quare impedit* against the patron and incumbent, if the patron dies, and the plaintiff is nonsuited, the incumbent shall recover damages by the statute of Westminster; Br. *Quare Impedit*, cites 22 H. 6. 24. And where patron and incumbent plead one and the same plea, there both shall recover damages if the incumbent was admitted, for otherwise he shall not recover damages; per Newton, Br. *Quare Impedit*, pl. 83, cites 22 H. 6. 25. So where an abbot claims to hold in *proprius usus* he shall recover damages, for he is patron and incumbent. Br. *Quare Impedit*, pl. 6, cites 9 H. 6. 8.

† It has been said (Jenk. Cent. 281.328-4.) that costs were recoverable in a *quare impedit* at the common law, and that the reason why they are not still so in the cases where damages are given by the statute of Westminster 2. is the great amount of those damages. But both this law and reasoning seem incorrect; at the common law a plaintiff recovered costs in no one instance; and as no damages could be recovered in a *quare impedit* before the statute of Westminster 2. no costs could be recovered in any such case under the statute of Gloucester; and on the other hand, if some damages might have been obtained in a *quare impedit* before the statute of Westminster 2. that act would have been accumulative, increasing the damages where some were before recoverable; and then, however large or exorbitant those damages might be, it is clear that costs would have followed a recovery. See 2 Inst. 289, 362; 1 Inst. 176, 344, b; 3 Inst. 356; 5 Co. 59, a; 6 Co. 51, a; Bul. N. P. 128.

[355] the defendant is not entitled to costs, on the demurrer. Soon after the passing of that statute the case of *Thomas v. Lloyd* was decided in the King's Bench, 1 Salk. 194; and 1 Lord Raym. 336; which was a plea of privilege by the defendant, and holden good on demurrer; it was contended that he was entitled to costs in consequence of that judgment; but the court determined that costs were only given by the statute where the right was reciprocal between the plaintiff and defendant. The same question came before the Court of King's Bench, in the case of *Garland v. Extend*, on a plea in abatement; and costs were again refused in *Miller v. Seagrove, Cooke*. Prac. 25; the latter underwent repeated arguments and consideration, and though one of the judges differed at first from the rest of the Court, yet it was afterwards solemnly resolved that no costs should be allowed. The construction which was put on the statute in that case we think the true one, that the costs given by it are confined to cases where the plaintiff as well as defendant is entitled to them.—Rule absolute. See *Anon. Co. Prac. C. P. 4*; 1 *Hullock*. 146. 2d Edit.

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[536] See also tit. Abatement, Pleas in, Affidavit of Debt, Ancient Demesne, Arbitration, Attachment, Attorney, Bail, Bail Bond, Bankrupt, Bills of Exchange and Promissory Notes, Certiorari, Costs, Distringas, Ejectment, Error, Escape, Execution, Extent, Fines and Recoveries, Habeas Corpus, Highway, Hundred, Indictment, Information, Issue, Judgment, Jury, Lottery, Mandamus, Merits, Affidavits of, Motion and Rules, New Trial, Outlawry, Peace, Articles of, Penal Action, Perjury, Pleas, Prisoners, Process, Prohibition, Puis Darrien Continuance, Quo Warranto, Rescue, Scire Facias, Settlement, Sheriff, Stamp, Southwark, Suppœna, Trial, Venue, View, Warrant of Attorney, Witness.

* The only cases comprised under this division are those connected with the title of the affidavit, the deponent's addition, &c. the *jurat*, and the admissibility of explanatory or contradictory affidavits. The body of the depositions necessarily vary according to the circumstances of each case: and therefore the rules relating to particular instances will be classed under their respective heads. The general rule which pervades through the whole of the decisions connected with the subject is, that the affidavit must set forth all the facts and circumstances necessary to be stated on each particular application explicitly and with certainty, and that where a deponent swears to any fact as within his own knowledge, he must swear directly and positively.

I. BY WHOM MADE.*

1. **REX v. DAVIS AND CARTER**, M. T. 1694, K. B. 2 Salk, 461; S. C. 5 Mod. 75; S. C. Holt, 501.

The defendants having been convicted of forgery, and having stood in the pillory for the offence, were now brought before the court, and prayed that they might be committed to the custody of the marshal, as the sheriff of London oppressed them in Newgate, where they were detained for not paying a fine, &c. Their own affidavits were offered to prove the oppression.

Per Holt, C. J. If a man has stood in the pillory for an offence which is contrary to the faith, credit, and trust of mankind, such as forgery, he cannot be admitted as a witness in a cause, and the same principle applies to his deposing in an affidavit. See *Nicholson v. Dalbyhanty*, Barnes, 79; 1 Phil. Ev. 23, 24, 3d ed; Peake, Ev. 124, 126, 2d ed; Gilk. Ev. 140; 1 Tidd. 200, 7th edit; 1 Arch. Prac. 56; Petersdorff on Bail, 140.

2. **WALKER v. KEARNEY**, H. T. 1700, K. B. 7 Mod. 413; S. C. Stra. 1148. [357]

A rule nisi for an attachment having been granted on the affidavit of the defendant, the party complained against, in showing cause stated that the defendant had been convicted of forgery, and had stood in the pillory, and produced the record, and an affidavit of the identity of his person. *Per Cur.* The rule must be discharged for we cannot suffer this affidavit to be read. Salk. 461; 5 Mod. 74; Hawk. 461. In *Niccols v. Delahunt*, Barnes, 79, the affidavit to hold to bail being made by one convicted of forgery, the affidavit was refused. In *Charlesworth's* case, such affidavit was read, but that was to defend himself against a complaint, where the prosecutor had in a manner appealed to his affidavit; but even there it was said that to support an accusation it should not be read. If he cannot be a witness in a civil suit, where a third person is interested in his evidence, *a fortiori* he shall not be received there. See *Hand, Prac.* 14; 3 Lev. 42; 2 Hawk. P. C. 46; 2 Hale, P. C. 217; 2 Wils. 225; and post, tit. Judgment in Criminal Proceedings; and *Davis v. Carter*, 2 Salk. 461.

A person convicted of an infamous crime is incapacitated from making a valid affidavit.

But altho' the affidavit of a person convicted of a crime is not admissible in support of a complaint, yet it may be read in exculpation of a charge.

3. **LEE v. GANSELL**, H. T. 1774, K. B. Cowp. 3.

An objection was taken to the reading of an affidavit, on the ground that the party who had made it had been convicted of perjury. The conviction was produced; but per Lord Mansfield. A conviction upon a charge of perjury is not sufficient, unless followed up by a judgment. I know of no case where a conviction alone has been an objection, because, upon a motion in arrest of judgment, it may have been quashed. See *Com. Dig. tit. Testm. A. 5*; *Gillb. Ev.* 129; 4 Burn. 2283; 8 East, 79; 11 East, 309; 5 M. & S. 244.

To establish the incompetency of deponent the conviction alone is not sufficient; the judgment must be produced.

4. Case cited as of M. T. 1704, K. B. in *Davis v. Carter*, 2 Salk. 461.

A motion was made to set aside a judgment for irregularity on the defendant's affidavit; the reading of it was opposed because he had been convicted of perjury. Per Holt, C. J. Must he therefore suffer all injuries, and have no way to help himself? Powell, J. You ought to have the record of conviction in your hand when you make this objection; but Per Holt, C. J. If he had, it would be nothing to the purpose. See *S. P. Horsey v. Somers*, Barnes, 116; and *Bland v. Drake*, 1 Chit. Rep. 165; post, title Affidavit of Debt, p. 380.

Qu. whether the conviction of a party for an infamous crime disqualifies him from making an affidavit.

II. HOW ENTITLED, WITH REFERENCE TO THE COURT.

(A) IN THE KING'S BENCH.

1. **KENNET CANAL COMPANY v. JONES**, M. T. 1797, K. B. 7 T. R. 451.

It was objected to an affidavit that it was not entitled in the King's Bench, and that the commissioner before whom it purported to have been sworn was not described as a commissioner of this court; but both alleged defects were considered to be of no weight, as the party might be safely indicted on it for perjury, if it should prove untrue.

In the K. B. it is not essential that the affidavit should be entitled of for the Court. [358]

* An affidavit may in general be made by any person, of whatever religion, rank, or country, (1 Phil. Ev. 19, 3d ed.) having the use of his reason, and such religious belief as to feel the obligation of an oath. The other numerous disqualifications which might be urged against the party if he were adduced as a witness in a cause, do not in strictness render him incompetent to depose to facts, on special application to the Court.

Provided it can by any means be collected that it was sworn before a person authorized to administer an oath.

Hence affidavits

sworn before a judge in K. B. need not be entitled; but affidavits taken before a commissioner cannot be read, unless it be stated that he was a commissioner of the Court;

Or other circumstances from which an inference in favour of the party's authority may be drawn.

In the Common Pleas, an affidavit to which the name of the Court is not prefixed cannot be read.*

Affidavits taken before commissioners according to 29 Car. 2. c. 5. must be in a cause in Court.

[359] Where there is a cause in court, all affidavits used in the progress of the cause, must be entitled correctly in the cause, stating the christian as well as the surname of the parties.

Describing the cause A. B. and another is bad.

The opposite party consenting to such defects will not render the document less in valid.

2. BEARD V. DRAKE, H. T. 1819, K. B. 1 Chit. Rep. 165.

The affidavit was not entitled in any court, but at the foot it purported to be "sworn at the Filacer's Office, Pump Court, Temple, this 9th day of, &c. before John Yates, Deputy Filacer." This, it was contended, was irregular; and *Osborn v. Tatum*, 1 B. & P. 271; *Molling v. Poland*, 3 M. & S. 157; *Rex v. Hare*, 13 East, 189; and 1 Tidd. 200, were cited. The objection was overruled by Best, J. who said that the Court would take judicial notice of the filacer as one of its officers.

3. REX V. HARE, M. T. 1810, K. B. 13 East, 189.

On showing cause against a rule nisi for a mandamus, it was objected that the affidavits were entitled in the King's Bench, and that one of them purported to have been sworn before a commissioner, without its being stated that the officer was a commissioner of the court; and that the others were defective because not entitled in any court, though sworn before a judge; and the court after referring to the *Kennet and Avon Canal Company v. Jones*, *supra*, rejected the former, but received the latter.

4. MOLLING V. POLAND, T. T. 1814, K. B. 3 M. & S. 157.

The affidavit was not entitled in any court, but the words "by the Court," in the hand-writing of the filacer, were subscribed at the bottom of the *jurat*. But the court refused to take judicial notice of the hand-writing.

(B) IN THE COMMON PLEAS.

OSBORN V. TATUM, E. T. 1798, C. P. 1 B. & P. 271.

On a motion to stay execution, an objection was taken to the affidavit produced in support of the application that the words "In the" were only inserted, without the "Common Pleas" being subjoined. *Per Cur.* The defect is fatal; but as the rule has been enlarged, it should be discharged without costs.—Rule discharged.

III. HOW ENTITLED WITH REFERENCE TO THE CAUSE.

1. REX V. JONES, H. T. 1695, B. B. 2 Salk. 561.

If affidavits taken before commissioners in the country, according to 29 Car. 2, c. 5, be expressed to be in a cause depending between A. and B. and there is no such cause in court, they cannot be read, because the commissioners have no authority to take them, and perjury cannot be assigned thereon, otherwise if there be a cause in court; and the affidavit concerns some collateral matter.

2. FORES V. DIEMAR, E. T. 1798, K. B. 7 T. R. 661: S. P. KING *qui tam* V. COLE, E. T. 6 T. R. 642.

On showing cause against a rule for setting aside proceedings for irregularity, it was objected that the affidavit could not be received, as the christian as well as the surnames of the parties had not been inserted in the title of the affidavit; and the court, concurring in this opinion, refused to allow them to be read. See 1 B. & P. 36, 227; 3 Price, 199.

In the progress of the cause, must be entitled correctly in the cause, stating the christian as well as the surname of the parties.

3. THE KING V. THE SHERIFF OF SURREY, H. T. 1802, K. B. 2 East, 182.

On showing cause against a rule for an attachment, it appeared that the affidavit on which the rule had been obtained was entitled A. B. and another; and the court on that ground refused to make the rule absolute.

4. OWEN V. HURD, M. T. 1788, K. B. 2 T. R. 643.

Lord Kenyon, J. in this case observed, that he remembered an instance, many years ago, where there being no title to the affidavits in the cause, the court said they could not take any notice of them, even though the counsel on the other side did not wish to take the objection. As to parties; changing by consent; the general mode of proceeding prescribed by law; see *Ker*

* The same practice is observed in the Exchequer; 1 Manning, Ex. Prac. 83.

v. Osborne, 9 East, 377; Marshall v. Hopkins, 15 East, 309; sed vide Attorney General v. Nordstedt, 3 Price, 137.

5. STEYNER v. COTTRELL, H. T. 1811, C. P. 3 Taunt, 377.

Cause was in this case shown against a rule nisi, which had been obtained to set the proceedings aside on an action on a bail bond. The affidavits on which the rule had been obtained were entitled "Steyner, assignee, v. Cottrell," without stating of whom or what he was assignee. Rule discharged. See Prince v. Nicholson, 5 Taunt. 337; 1 Chit. Rep. 728. n.

6. BUCKLEY v. TWEEDIE, E. T. 1805, K. B. 2 Smith, 393.

The defendant was brought up to be discharged under the Lord's Act. The plaintiff's counsel tendered him a note to pay the prisoner his sixpences in the usual form. This was written on the same piece of paper as the affidavit verifying the signature of the note, which is required to be verified, unless the plaintiff attends in court. The note was duly entitled in the cause, but there was no other title to the affidavit or it was wrongly entitled. Application was made to the Court to discharge the prisoner, and authorities were cited to show that all affidavits in a cause should be properly entitled, or they could not be read. On the other side it was contended, that the affidavit might be considered to be entitled by reference to the note to which it was annexed; *Sed per Cur.* The affidavit is necessary to verify the note and detain the prisoner. This is clearly within the general rule, that an affidavit made in a cause should be properly entitled, which the present affidavit is not.—Prisoner discharged.

7. DAND v. BARNES, H. T. 1815, C. P. 6 Taunt. 6; S. C. 1 Marsh. 403.

An application made by the defendant was opposed on the ground that the rule obtained, and the affidavits upon which it was grounded, purported to be made in a cause of Dand v. Barnes, whereas the action was brought against Barnes, together with three others, as appeared by the notice at the foot of the *capias*. *Per Cur.* There is a distinction between bailable and common process. In the former case the plaintiff could not, as in the present instance declare against each of the defendants separately; but being in this action entitled to do so, the defendant has a right to assume that the action was against him only until the plaintiff has brought the others into court. Rule absolute. See 1 Carth. 457; 2 T. R. 643; 7 id. 661; 1 Marsh. 274. and Christie v. Walker 1 Bing 48.

8. MACKENZIE v. MARTIN AND ANOTHER, T. T. 1815, C. P. 6 Taunt. 286.

A rule nisi had been obtained to set the proceedings aside in an action on a recognizance of bail, against the present defendants, upon the ground of Martin, one of the defendants, not having been served with process four days before the return of the writ. It was, however, contended that the defendant's affidavit upon which the rule was obtained was defective in being entitled "Mackenzie v. Martin, sued with Forbes," and not either in the original cause or in this cause of "Mackenzie v. Martin and Forbes." *Per Cur.* The affidavit is correctly entitled, as Martin could not know, until the declaration had been delivered, which had not been done, whether the plaintiff would proceed against one or both of the bail. Rule absolute.

9. PRINCE v. NICHOLSON, H. T. 1814, C. P. 6 Taunt. 333; 1 Marsh. 70. S. C.

A rule had been obtained, calling on the plaintiff to show cause why a verdict obtained by him should not be set aside, and a new trial granted, and the plea received which had been formerly refused, on the ground that the affidavit verifying its truth was not entitled in the cause. *Per Cur.* The affidavit refers to the plea, and is to be taken conjointly with it, and need not, therefore, be entitled in the cause. It has been suggested, that as the parties upon this objection to the plea being taken inserted the name of the cause in the affidavit, and then filed and reswore it, a new stamp was necessary; but this alteration is not sufficient to render a new stamp requisite.

the objection being made, it is afterwards entitled, a new stamp is not required.

10. ANON. M. T. 1814. K. B. 2, Chit. Rep. 727.

On showing against a rule for setting aside the service of a writ, it was ob-

The affidavit should state the character in which the parties sue or are sued; and an ambiguity in the title in this respect will be fatal.

A defect in the title of an affidavit cannot be aided by reference to a collateral document used in the same cause.

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If common process is sued out against B. and several others are not brought into court, B. may move the Court upon an affidavit entitled of a cause between the plaintiff and B. only.

So upon common process against two, one defendant may, be fore declaration, entitle his affidavit in a cause of

"A. against B. who issued with C." An affidavit annexed to a plea refers to the plea and need not be entitled of the cause.

But if, on

An affidavit entitled against one

defendant when there are three is insufficient. jected that the affidavit on which the rule had been obtained was only entitled as against one defendant, although there were three sued in the action, Per Bayley, J. The affidavit is irregular, and the rule must be discharged with costs. Rule discharged.

An affidavit entitled "in the cause of B. and others v. C." is irregular. The affidavit to enter up judgment on a warrant of attorney may be entitled as in a cause.

11. *BULLMAN v. CARLOW*, M. T. 1819, K. B. 1 Chit. Rep. 727. S. P. *DOE DEM. SPENCER v. WANT*, M. T. 1818, C. P. 2 B. MOORE. 722; 8 Saunt. 447. *ANONYMOUS*, M. T. 1822, K. B. MS.

An affidavit in support of an application for setting aside proceedings was entitled "Bullum and others v. Callow." It was submitted that the deposition was defective, and it should have specified the names of the other plaintiffs. The court acquiescing in this opinion, made the rule absolute, but without costs.

12. *SOWBERRY v. WOODROFF*, E. T. 1818, K. B. 1 B. & A. 567. *S. MANLEY v. THE MARQUIS OF BLANDFORD*, M. T. 1816, K. B. 1 B. & A. 568. *n. POOLE v. ROBERDS*, id. contra.

On motion to enter up judgment on an old warrant of attorney, it was objected that the affidavits were entitled in the cause. But the court disallowed the objection and the rule was made absolute.

13. *REX v. MEAD*, H. T. 1823, K. B. MS.

Affidavits in correctly entitled can not be taken off the file; but new ones, in which the mistake is rectified, may be filed.

A motion was made for leave to remove from the file certain affidavits in this cause, which had been, through inadvertence, improperly entitled. By the Court. We cannot permit affidavits to be withdrawn when they have been once filed. The party is at liberty to present other depositions, but they must be duplicates of those on the file, except as to the titles; no new matter or allegation must be inserted or statement omitted. The Court will carefully examine and ascertain whether any difference has been made. See Reg. Gen. 37 Geo. 3; 7 T. R. 184; 3 M. & S. 157.

IV. DEPONENT'S RESIDENCE AND ADDITION.*

(A) IN THE KING'S BENCH.

1. *BRUHET v. KITTOE*, M. T. 1802, K. B. 3 East, 153.

A foreigner landing here for temporary purposes may describe himself as of his place of residence abroad.† It was objected to an affidavit of debt, that the deponent had described himself as of a certain place in France; but the Court, after some hesitation, it not being disputed that the plaintiff had no domicile in England, discharged a rule which had been obtained to show cause why the defendant should not be released from custody. See 1 Tidd. 201. 6th edit.; 2 Arch. Prac. K. B. 280. Petersdorff on Bail, 172.

2. *SEDLEY v. WHITE*, M. T. 1809, K. B. 11 East, 527.

The deponent described himself as "late in the Compter-prison of Gilt-spur street, in the city of London. It appeared that prior to making the deposition, he had been discharged from prison, but had continued to sleep there at night by permission of the gaoler, and had no other determined place of residence. The Court held, that although in general, when a party has left one place of abode, and resides at another at the time of making the affidavit, describing himself as late of the place he formerly occupied, would be regarded as an evasion of the rule of M. T. 15 Car. 2. yet, from the peculiar situation of the deponent, the affidavit ought to be received. other residence, may describe himself as late of the prison; but a deponent having left one residence for another, cannot in general describe himself as late of the former.

3. *JARRETT v. DILLON*, M. T. 1000, K. B. 1 East, 18. S. P. *D'ARGENT v. VIVAN*, H. T. 1801, K. B. 1 East, 330.

[362] In this case the affidavit contained no statement of the deponent's addition or degree, but merely described his place of residence. It was contended that the affidavit was irregular; as it ought to have set forth his rank or degree in life. The Court admitted the validity of the objection, and observed that it was important to preserve a uniformity in the proceeding, and that

* By a rule of Court, made in the K. B. M. T. 15 Car. 2. it is directed that, "the true place of abode, and true addition of every person who shall make affidavit in Court, shall be inserted in such affidavit."

† But if he has a permanent and settled domicile in England, he should be described as of his place of abode in this country.

no affidavit should be received without such addition. See *Vaissear v. Alderson*, supra; and *Holcombe v. Lambkin*, id.; 1 Chit. Crim. Law, 203; and ante, tit. Addition; post, tit. Affidavit of Debt.

4. *HICKMAN v. COLLEY*, E. T. 1738, K. B. And. 377; S. C. 2 Stra. 1120, but not S. P.

Upon a motion to enter a suggestion on the 3 Jac. 1. c. 15. in an action of assumpsit. The affidavit described the plaintiff as a citizen and bricklayer of London, which was admitted by the Court to be sufficient.

5. *HASLOPE v. THORNE*, H. T. 1803, K. B. 1 M. & S. 103.

The affidavit in this case stated, that "A. B. Clerk of L. H. of America-square, in the city of London, ship-mariner's agent, maketh oath," &c. It was objected that the clerk's place of abode, and not that of the principal, should have been inserted, the former not sleeping at the house of the latter. *Sed per Cur.* The object of the rule 15 Car. 2. was, that the description of the deponent's residence should be of that place where he was usually to be found, and not merely his place of rest. See *Anon.* 1 Chit. Rep. 464; 2 Chit. Rep. 15. semb. S. C.

6. *HALCOMBE v. LAMBKIN*, E. T. 1814, K. B. 2 M. & S. 475.

The deponent described himself as "A. B. Gent. of Chelsea." The Court received the affidavit, and overruled an objection that had been taken to it, on the ground that the description was insufficient.

7. *VAISSEAR v. ALDERSON*, M. T. 1814, K. B. 3 M. & S. 165.

In describing the deponent in the affidavit he was stated to be "A. B. of the city of London, merchant." It was urged that the particular street or square should be introduced. *Sed per Cur.* This description would be sufficient in an indictment, and we can perceive no tangible reason why it should not be sufficient in the present instance.

8. *ANONYMOUS*. H. T. 1805, K. K. 2 Smith. 207.

A motion was made to set aside proceedings for a defect in the affidavit. The affidavit stated a place of abode of the plaintiff, which was not true in point of fact. This, it was contended, was not a compliance with the rule of court, for it was as if no place of abode was stated. The affidavit is not informal. It is by much too strict in point of formality. If you have any objection to it, you must indict the party for perjury. We should otherwise have an issue upon almost every affidavit to ascertain whether the party is properly described or not.

(B) IN THE COMMON PLEAS.*

1. *DAVISON v. REED*, T. T. 1732, C. P. Prac. Reg. 12.

On a rule to show cause it was contended, that the affidavit made by the defendant was insufficient, as it did not name him as defendant, consequently there might be others of the same name. The Court admitting the validity of the objection, discharged the rule.

2. *SMITH v. YOUNGER*, M. T. 1803, C. P. 3 B. & P. 550.

Deponent described himself as J. J. of W. in the county of E. "manufacturer." An objection that it was too vague to be overruled.

3. *POLLEN v. DE SOUZA*, M. T. 1811, C. P. 4 Taunt. 123.

The affidavit was made by John M. clerk to James M. of G. L. lane, in the city of London, merchant. It was contended, among other objections to the affidavit, that the deponent's place of abode should have been mentioned; and the Court, though principally, it appears, on another ground, discharged the defendant out of custody.

4. *ANON.* H. T. 1815, C. P. 6 Taunt. 73.

It was objected to a rule previously obtained, that the affidavit in support of it only contained the name and place of abode of the deponent; and that the addition of his degree was necessary. *Per Cur.* The practice of the Court of King's Bench requires it, according to the rule of court Mich. 15

* There is no rule of the Court of Common Pleas requiring a statement of the deponent's addition and place of abode, and it seems extremely doubtful whether the practice of the two courts in this respect assimilate. *Vide supra*, 364.

Describing the deponent as a citizen and bricklayer of London is sufficient. A clerk may describe himself of the office where he does business during the day, although he sleeps elsewhere during the night. "Gentleman, of Chelsea," is a sufficient description; or "Of the city of London merchant." The Court will not try the real place of the plaintiff's abode, upon affidavit. A defendant in a cause should describe himself in the affidavit as such. In the C. P. the addition of manufacturer is sufficient. Semb. the place of abode should be inserted as in the [364] Though in the C. P. it seems that the addition of the defendant's degree in an affidavit in which his name and place

of abode
are describ
ed is not
necessary.

An affidavit
not entitled
in any
court, but
only sub
scribed
with the
words, "By
the Court,"
at the bot
tom of the
jurat, not
admissible.
But if it per
port at the
foot to have
been sworn
before J. Y.
deputy fila
cer, it is
not suffi
cient.

Car. 2; but there is no such special rule in the Court of Common Pleas.—
Rule absolute. See 1 East, 18.

V. JURAT.

(A) WHEN SWORN IN COURT.

1. MOLLING v. POLAND, T. T. 1814, K. B. 3 M. & S. 157.

At the bottom of the jurat the words, "By the Court," were subscribed; but the affidavit was not entitled in any court. It was urged that these words appeared to be the hand-writing of the master, and as such ought to be judicially recognized. But the Court rejected the deposition. See *Osborn v. Tatum*, 1 B. & P. 271; the *King v. Hare*, 1 East, 189; *French v. Bellew*, 1 M. & S. 802.

2. BLAND v. DRAKE, H. T. 1819, K. K. 1 Chit. Rep. 165.

The affidavit in this case purported to be sworn at the Filacer's Office, Pump Court, Temple, this 9th day, &c. before John Gates, Deputy Filacer. This, it was contended, was irregular, according to several authorities, (*Molling v. Poland*, supra; 1 B. & P. 271; 13 East, 183. But per *Best, J.* The objection has already been taken before Mr. J. Bayley at chambers, and he was of opinion that it was not tenable, because the Court will take judicial notice of the filacer as one of its officers. See 2 Arch. Prac. K. B. 281; 1 Tidd. 514. 6th edition.

(B) BEFORE A JUDGE.

THE KING v. HARE, M. T. 1810, K. B. 13 East, 189.

This was an application for a *mandamus*; but on inspecting the affidavits, none of them appeared to be entitled "In the K. B." but one of them purported to have been sworn before Bayley, J. The Court considered this admissible. See authorities referred to in *Petersdorff on Bail*, 186. n. t.

(C) BEFORE A COMMISSIONER.

1. THE KING v. HARE, M. T. 1810, K. B. 13 East, 188.

On an application for a *mandamus*, some of the affidavits in support of the motion did not contain any statement in the jurat that the individual before whom they were sworn was a "commissioner, &c." The Court accordingly held them inadmissible. [365] It should appear in the jurat that the person before whom it was sworn is a commissioner of the court.

2. KENNET CANAL COMPANY v. JONES, M. T. 1797, K. B. 7 T. R. 454.

The affidavit stated in the jurat, that it had been taken before T. M. a commissioner, &c. without alleging of what court he was a commissioner, or of what material was the affidavit entitled of any court. The Court considered neither of these defects in the deposition available, it being verified, on showing cause, that the person before whom the affidavit was sworn was really a commissioner, and duly authorised to administer an oath. See 7 T. R. 376; 8 T. R. 77; *O'Mealy v. Newell*, 8 East, 364; 13 East, 189; 3 M. & S. 493.

3. *REX v. THE JUSTICES OF THE WEST RIDING OF YORKSHIRE*, H. T. 1815,

K. B. 3 M. & S. 493. *S. P. ANONYMOUS*, E. T. K. B. 1814. Cited 2 Arch. Prac. K. B. 281. *SYMMONS v. MASON*, M. T. 1797, 1 B. & P. 105. *semb. contra.*

On showing cause against a rule for a *mandamus*, the affidavit appeared to have been sworn before a commissioner of the Court, but nothing was mentioned in the jurat as to what place the oath had been administered in; this omission, it had been contended, rendered the affidavit invalid and inadmissible. *Per Cur* This objection cannot be got over. It is a general rule that the place where the depositions are taken should be specified in the jurat, as it affords the Court a medium through which they may, by referring to their records, ascertain the authority of the person before whom it purports to have been sworn.

4. *BOYD v. STRAKER*, M. T. 1819, Exchequer, 7 Price, 662.

In the jurat of an affidavit of justification of bail, it was stated that it was sworn at Beverly, omitting the county. On objection taken, the omission was holden to be a fatal defect.

An affidavit
purporting
in the jurat
to have
been sworn
before a
judge, tho'
not entitled
in any court
may be
read.
[365]
It should appear
in the jurat
that the person
before whom
it was sworn
is a commissioner
of the court.

But this
would not
be consider
ed material
if the affida
vit be cor
rectly enti
tled "in the
K. B." and
the commis
sioner be
in fact a
commission
er of the
court.
It is indis
pensable
that the ju
rat should
state the
place;
where the
affidavit is
sworn;
And the
county;

5. WOOD v. STEVENS, E. T. 1819, C. P. 2 B. 8 Moore, 236.

An affidavit was produced in this cause which contained no statement of the month in which it had been sworn. The omission was considered incurable, and the affidavit rejected.

And the month. [366]
The jurat must state that the affidavit was read over and explained to an illiterate deponent; And that the deponent understood the contents of the document to which his name is subscribed; And that the mark was affixed in the presence of the commissioner; And read over in his presence.

(D) BY ILLITERATE PERSONS.

1. **REG. GEN. T. T. 1790, K. B. 4 T. R. 284; 1820, Exch. 8 Price, 501, Manning, Ex. Pracc. App. 224.**

Where an affidavit is made before a commissioner, by a person who, from his signature, appears to be illiterate, the commissioner taking the affidavit shall certify or state in the jurat, that it was read in his presence to the party making the same, who seemed perfectly to understand it, and wrote his signature in the presence of the commissioner.

2. **ALLWORTHY'S BAIL, M. T. 1815, K. B. 2 Chit. Rep. 92. S. P. ANONYMOUS, M. T. 1822, K. B. cited Petersdorff on Bail, 188, n.**

An affidavit in justification of bail was adduced; but as the jurat did not state that it had been read over and explained to the deponent, and that he understood its contents, further time was granted.

3. **ANONYMOUS, M. T. 1815, K. B. 2 Chit. Rep. 92.**

One of the bail was a marksman, and the jurat in the affidavit of justification, did not state that his mark was made in the presence of the commissioner. Time to amend was given.

4. **ANONYMOUS, M. T. 1822, K. B. MS.**

The jurat stated that the affidavit had been read over to the deponent, but did not proceed to allege that it was read to him in the presence of the commissioner. The Court rejected the document, observing that it was an incumbent duty on them to see that every thing proper had been done, where ignorant persons are called upon to depose on oath, and that the reading over and giving an explanation should be in the actual presence of the commissioner.

(E) BY TWO OR MORE DEPONENTS.

1. **REG. GEN. M. T. 1796, K. B. 7 T. R. 82, T. T. 1820, Exch. 8 Price, 501.**

Upon every affidavit sworn in the court, or before any judge or commissioner thereof, and made by two or more deponents, the names of the several persons making such affidavit shall be written in the jurat.

2. **ANON, H. T. 1815, K. B. 2 Chit. Rep. 19.**

An objection was taken to affidavits filed in support of an application to set aside proceedings on the ground that there were two several deponents, and their names were not inserted in the jurat; the validity of the objection was admitted, and the affidavit rejected.

3. **REX v. THE SHERIFFS OF LONDON, E. T. 1815, Exch. 1 Price, 338.**

On a rule nisi to set aside an order for an attachment, it was contended that the affidavit in support of the rule was insufficient, it being sworn by two persons, and it did not appear from the jurat that both the deponents had been sworn. Thompson, C. B. I am not inclined to reject this affidavit, as it is conformable with the general practice. But it will be better in future to state that all the deponents have been sworn in the jurat; therefore this must be considered as a rule. See Reg. Gen. ante, 366.

4. **— v. —, M. T. 1815, Exch. 2 Price, 1.**

On producing an affidavit in this cause, it was observed by counsel that the jurat purported to have been sworn "by both deponents," and that he thought it necessary to acquaint the Court with the circumstance, as that form of describing them was rather unusual. Yet he submitted that where an affidavit has been sworn by all the deponents as here, such a caption should be deemed sufficient, there being no rule of Court that each of the deponent's names should appear on the jurat to have sworn to its contents. The Court, admitting the correctness of this doctrine, received the affidavits.

Affidavits must insert in the jurat the names of all the deponents. And if this rule be complied with, the affidavit will be rejected. [367]
And that it has been sworn to by all the deponents.
Prior to the preceding rule of Court it was unnecessary in the Exchequer to state the name of all the deponents.

When there is a defect in the jurat the affidavit cannot be used, nor will time be given except in cases of bail.

An objection that the affidavit was sworn before the defendant's attorney's clerk, or agent, overruled.

[368] An affidavit made before a judge in Ireland is admissible.

But it must be properly authenticated.†

(F) CONSEQUENCES OF A DEFECT IN THE JURAT.

ANONYMOUS, M. T. 1816, K. B. 2 Chit. Rep. 20.

The counsel who had been instructed to move the Court having discovered an error in the jurat, applied for time to amend the effect, but the request was refused; the Court intimating that it was the invariable rule to refuse such applications, except in the case of bail.

VI. BEFORE WHOM TO BE SWORN.*

1. COCKSLEDGE, v. RICKWOOD, E. T. 1746, C. P. Barnes, 45.

It was objected to the affidavits produced by the defendant, that they purported to be sworn before J. C. and A. T. commissioners, who were at that time sworn to be the clerks or agents of the defendant's attorney. But the Court over-ruled the objection, observing that the general principle extends only to the attorneys themselves; the commissioners are not sworn to be agents in this cause, though it had been substantiated that they were menial servants, it might have been a sufficient objection.

2. ALCOCK v. CARTER, H. T. 1722, K. B. 1 Stra. 545.

On a motion to set aside an assignment of error in a cause pending in Ireland for the want of a warrant of attorney, the defendant in error, on opposing the application, produced an affidavit sworn before one of the judges in Ireland, accompanied by a certificate from the proper officer, that no warrant had been filed; and likewise by an affidavit of the agent here, that he had received both from Ireland, and believed them to be authenticated. *Per Cur. This is sufficient to satisfy us that there is some foundation for our sending a certiorari; and therefore the errors must stand.*

3. SINTHORPE v. ADAMS, T. T. 1736, C. P. Barnes, 40.

This was an application for leave to enter up judgment on an old warrant

* The affidavit may be sworn before a judge of the court in which the deposition is intended to be used; or before a commissioner duly authorized for that purpose. In respect to the latter, the 29th Car. 2, c. 5, enacts that "the judges of K. B. or any two of them, the C. J. being one; and the same in the C. P.; and the lord treasurer, chancellor, and barons of the Exchequer, or two of them, whereof the lord treasurer, chancellor, or the chief baron shall be one, may by commissions under seal of the respective courts, empower persons as commissioners in England, Wales, or Berwick, to take affidavits concerning any thing depending in those courts, and any judge of assize, on his circuit, may take affidavits to be filed in the offices, and used as other affidavits; and all persons forswearing themselves therein shall incur the same penalties as if the same had been taken in open court. By a rule of H. T. 1823, K. B. it is ordered that in future "no commission for taking affidavits shall be granted to a practising conveyancer, unless he be also an attorney, duly enrolled and certificated. 1 B. & C. 288; 2 D. & R. 43; and the same rule has been since extended to attorneys practising in the courts of Wales and counties palatine. 1 B. & C. 656; 2 D. & R. 870.

The judges of the courts of King's Bench and Common Pleas in Ireland have the same power of appointing commissioners to take affidavits in all parts of Great Britain as they have in Ireland. See the statute 55 Geo. 3, c. 157, § 7. As to the Isle of Man, see 6 Geo. 3, c. 50, § 2.

† It has been observed (1 Lee's Dict. Princ. 13,) that when an affidavit is made in either Ireland or Scotland, the party verifying it should depose that it was made by the plaintiff; that the hand-writing subscribed is the plaintiff's signature; that it was made and taken before a magistrate, who deponent believes had competent authority to administer an oath; and that the name of the person subscribed to the affidavit is the hand-writing of the magistrate appears to be the only fact that need be verified. Thus where an affidavit of debt containing no place in the jurat but purporting to be sworn before the Chief Justice of the Court of King's Bench in Ireland, and to bear his signature, the authenticity of which was proved upon oath, it was considered sufficient to authorise granting a judge's order to hold the defendant to bail. 8 East, 372. Lord Ellenborough, in the case just referred to, observed, "The only question is this, whether in the exercise of our discretion, we must not presume that the Chief Justice of Ireland acted within that jurisdiction within which alone he was competent to act, viz. by taking the affidavit and subscribing his name to it in Ireland. I think we cannot presume that he acted in this case out of his jurisdiction. The practice of the Court in requiring an affidavit to be made for the purpose of arresting under a judge's order is, for the guidance of its discretion, that the amount of the debt may be made to appear before the Court interposes its authority. It is in the nature of a solemn certificate of the existence and reality of the debt; but that may be made to appear by any such species of evidence as the Court may deem in its nature reasonable. Is this then such a solemn certificate as the Court may reasonably be satisfied with? I think, considering the high office of the person whose signature the

of attorney, founded upon an affidavit sworn by the plaintiff resident in Ireland, before a commission of the Court of C. P. there, stating the due execution of the warrant of attorney, and that the defendant was living &c. But the Court rejected it as not being properly authenticated.

4. KING v. WALLACE, T. T. 1789, K. B. 3 T. R. 403. S. P. JENKINS v. MASON, E. T. 1819, C. P. 3 B. Moore, 325. SMITH v. WOODROFFE, M. T. 1818, Ex. 6 Price, 231.

On a rule to show cause why an attachment should not issue against the defendant for having made a false return to an *habeas corpus*, it appeared that the affidavits on which the attachment had been moved for had been sworn before the attorney for the prosecution. *Per Cur.* The manner in which these affidavits have been sworn entirely invalidates them. Was the rule on the subject less rigid and inflexible, we should be desirous of admitting them, the present motion being a case of *habeas corpus*; but as the rule is invariable, and founded on the wisest and most obvious principles, we must refuse the application. See 3 Atk. 813; 1 Rose. 145.

5. BATT v. VAISEY, T. T. 1814, Exch. 1 Price. 116.

On a rule to show cause why the proceedings taken in this cause should not be staid, it appeared that the affidavit on which the rule had been obtained, had been sworn before the partner of the defendant's attorney, which it was contended, rendered the affidavit invalid. And the Court adopting that opinion, set the rule aside with costs.

6. HODGSON v. WALKER, T. T. 1810, Exch. Wight. 62.

On the production of an affidavit it was contended that it had been sworn before the plaintiff's solicitor; to which the plaintiff replied, that it did not appear that the person before whom it was made was the plaintiff's attorney, and that that fact should have been verified by affidavit. *Per Cur.* The truth of this suggestion must be proved by affidavit; for though it appears that the person before whom it was sworn bears the same name, still it does not follow that he is the same person.

7. GOODTITLE DEM. PYE v. BADTITLE, T. T. 1800, K. B. 8 T. R. 638.

On a rule to show cause, it appeared that an affidavit had been sworn before one C. a commissioner, who was employed as clerk in the office of the plaintiff's attorney. *Per Cur.* The rule prohibiting affidavits being taken before the attorneys concerned in the cause does not extend to their clerks. Rule discharged. See ante, p. 367.

8. READ v. COOPER, T. T. 1813, C. P. 5 Taunt. 89 S. C. recognised in JENKINS v. MASON, 3 B. Moore, 325.

A rule nisi had been obtained to set aside a judgment as in the case of a nonsuit for not proceeding to trial. The affidavits upon which the rule had been obtained, were, however, objected to, as having been sworn before the defendant's own attorney in the country. But this was held not to vitiate, as he was not the attorney on the record. Rule absolute.

9. DODD v. ADCOCK, H. T. 1735, K. B. Ca. Temp. Hard. 211.

Motion for an attachment against an attorney for taking an affidavit, being deputy town clerk, and then acting as attorney for the plaintiff. *Per Lord Hardwick, C. J.* Whether the attorney's conduct be right or wrong, I do not see there can be any ground for an attachment; the doctrine is, that if there appear only a mistake in judgment to refuse admission to such affidavit; and if it be done wilfully, then to grant an information, I think there is no reason for an attachment; though if the party acted as judge in the cause, being attorney at the same time, that would have been a ground for an information.

10. EX-PARTE WORSLEY, M. T. 1793, C. P. 2 H. Bl. 275.

In support of an application to pass a recovery, an affidavit was produced purporting to have been sworn before a magistrate at Gibraltar, but not attested by a notary public. *Per Cur.* Although we have taken judicial notice of the Chief Justice of Ireland, and been satisfied with a verification of his hand, affidavit bears, we ought to give credence to it as an act done conformably to the authority vested in him,

* Except affidavits of debt. *Vide post.*

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An affidavit sworn before an attorney in the cause cannot be received;*

Or before the partner of the defendant's attorney. But it must be shown that he is the attorney; the fact of his being of the same name is not sufficient: The preceding rule, however, does not extend to an attorney's clerk when otherwise duly authorized;

Or to the actual attorney of the party, if he be not the attorney on the record.

Or to the actual attorney of the party, if he be not the attorney on the record.

Or to the actual attorney of the party, if he be not the attorney on the record.

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Or to the actual attorney of the party, if he be not the attorney on the record.

Or to the actual attorney of the party, if he be not the attorney on the record.

ticated by writing, yet there is a great difference between him and an ordinary magistrate; in the latter case the affidavit ought invariably to be attested by a notary public. See *Beawes Lex Mercatoria*, 6th ed. 421; *Thurly v. Faber* 1 Chit. Rep. 463; *Omealy v. Newell*, 8 East, 364; *French v. Bellew*, 1 M. & S. 301.

11. *DASMER v. BARNARD*, E. T. 1797, K. B. 7 T. R. 251.

In showing cause against a rule it was objected that the affidavit on which it had been obtained could not be read, as it had been properly sworn. The affidavit had been taken before one J. C. who designated himself "high bailiff and chief magistrate of the district of D. in the Isle of Man." A deposition by another person was likewise produced, who deposed that he had seen J. C. Esq. high bailiff, &c. of the Isle of Man, write, and that he verily believed the name of J. C. subscribed was the hand-writing of the said J. C. &c. *Per Cur.* We are clearly of opinion that the affidavit is sufficient. We must take cognizance of such documents when sworn before foreign judicatures properly authenticated. In this case it has been duly verified, and therefore admissible.

12. *TURNBULL v. MORETON*, M. T. 1819, K. B. 1 Chit. Rep. 721.

An objection was taken to this affidavit on the ground that the deposition had been sworn before a justice of the peace in Scotland, which, it was contended, was insufficient, he not having authority to administer oaths in civil suits. But *per Cur.* There is no weight in this objection, the hand-writing being properly authenticated.

VII. OF THE STAMP.*

[371] 1. *ANON.* E. T. 1811, C. P. 3 Taunt. 469. S. P. *GILBY LOCKYER*, T. T. 1779. 1 Doug. 217.

The affidavits in four causes were each of them entitled in all the four, but there was only one stamp on each affidavit; and on an objection being taken on that ground, the Court held the objection fatal, as no indictment for perjury could be sustained on them; but they permitted them to be amended by striking out three of the names, and re-swearing the affidavits in the fourth cause. See 2 Chit. Rep. 14; 4 B Moore. 413.

2 *ANON.* H. T. 1815, K. B. 1 Chit. Rep. 452. note. S. P. *ATKINS v. REYNOLDS*, 2 Chit. Rep. 14.

Separate affidavits had been inserted on the stamp and paper. An objection was taken to them on the ground that the subject matter in dispute was not a joint but a separate claim, and that only one stamp was affixed. They were accordingly rejected.

3. *REX v. MULLER*, T. T. 1813, K. B. 1 Chit. Rep. 452. note.

On a *quo warranto* prosecution, the Court allowed that an affidavit with one stamp was sufficient to ground four rules.

4. *REX v. CARLISLE*, T. T. 1819, K. B. 1 Chit. Rep. 451.

On the defendant's appearing in Court to plead several indictments and informations which had been exhibited against him for publishing certain libels, he tendered affidavits respecting them written on one stamp only. *Per Cur.* The affidavits having reference to several indictments and informations, they cannot be received unless there be a stamp applicable to each case.

5. *CHITTY v. BISHOP*, E. T. 1820, C. P. 4 Moore. 413.

A judge at chambers, upon hearing cause shown on affidavits, directed the motion to be made in court; accordingly the motion was made; and upon the same affidavits being produced, it was contended that they could not be read, as they had not been re-stamped. *Per Cur.* The objection is fatal; the re-swearing without re-stamping is nugatory.

6. *DE WOOLF AND OTHERS v. —*. T. T. 1821, K. B. 2 Chit. Rep. 14.

One of several persons jointly interested in the subject matter having made

* By the general stamp act (55 Geo. 3, c. 184, § 49; 49 Geo. 3, c. 149,) a duty of 2s. 6d. is imposed on all affidavits to be filed or read in any of the courts of law equity at Westminster, or of the great sessions in Wales, or of the counties palatine of Chester, Lancaster, Durham, or before any judge or master of the said courts.

an ineffectual application to the Court; the other parties subsequently made another application, referring to the same affidavits in support of their motion. On this course of proceeding being objected to, Bayley, J. said, that though the applicants were parties to the depositions used on the former occasion, they were entitled to resort to them, notwithstanding the circumstance of their having been previously filed.

VIII. WHEN AND HOW TO BE FILED,* AND COPIES OBTAINED.

1. *REX v. DUFFIN*, M. T. 1735, K. B. Ca. Temp. Hard. 158.

This was an application on the behalf of an attorney, for time to answer a matter contained in an affidavit. *Per Cur.* The general rule is, that affidavits ought to be filed before they can be read, and that should be done the day before, for they are read as copies of the records of the court; and are esteemed records, for every subject of England has a right to take copies of them; and they ought to be filed, that copies may be made, or else the crown is defrauded of the stamp duties.

2. *BEAL v. LANGSTAFFE*, H. T. 1768, C. P. 2 Wils. 371.

The defendant's bail and several other persons made an affidavit that the bail had entered into the recognizance at the instance and request of the defendant's attorney, and upon his undertaking to indemnify them. The bail moved that he might be compelled to fulfil his engagement. But *Per Cur.* This is only a breach of parol promise; and as there is nothing criminal in the charge, we cannot grant our summary interposition. It was then moved that the bail might have the affidavit returned to them; but the Court said, it has been read, and is now filed, and become a record of the court, and cannot be taken off file.

3. *DITCHET v. TOLLET*, M. T. 1816, Exch. 3 Price, 257.

The court in this cause refused to admit an affidavit made after a rule to show cause had been granted.

4. *TILLEY v. HENRY*, H. T. 1819, K. B. 1 Chit. Rep. 136.

A rule was obtained to show cause why the proceedings had in this cause should not be set aside on the ground of a misnomer. On showing cause two affidavits were produced, purporting to have been sworn two days after the rule for showing cause had expired. This was urged as an objection against their admissibility, and *Per Cur.* Affidavits sworn before the time of showing cause, although after the time mentioned in the rule nisi, may be read, unless by the terms of the rule it be required that the affidavits should be filed by a particular day. Discharged with costs.

5. *HOAR v. HILL*, H. T. 1819, K. B. 1 Chit. Rep. 27.

On showing cause against a rule for staying proceedings, an objection was taken to the affidavits on the ground that, according to the terms of the rule, they ought to have been filed one week before term. But the Court overruled the objection, no sufficient cause being shown, and ordered them to be filed *nunc pro tunc*, and read.

6. *THE KING v. ASKEW*, T. T. 1814, K. B. 3 M. & S. 9.

A motion was made to the court, and the application refused; it was then

* When an affidavit made in town has been used, but not before, it should be filed with the clerk of the rules in the King's Bench; in order that it may be given in evidence if necessary on an indictment for perjury. But country affidavits must be filed sooner, it being entertained provided by the statute 28 Car. 2, c. 5, that all affidavits sworn before the commissioners appointed by virtue of that act, shall be filed in the proper office of the court where the action or matter is depending, and then read. And it is a rule in the Court of King's Bench that all such affidavits be brought to the clerk of the rules of this court, to be filed in such convenient time, that copies of them may be duly made and delivered to the party filing the same. In the Common Pleas it is a rule that the secondaries shall not file any affidavits taken before any person that is not commissioned to take the same, and that no affidavit be read in court before the same is filed.

† In the King's Bench, it is a rule of 36 Geo. 3, that where a special time is limited in any rule, before which any affidavit is required to be filed, no affidavit filed after that time can be made use of in court, or before the master, unless it appear to the satisfaction of the Court that the filing of such affidavit within the time limited was prevented by inevitable accident.

[372]
on an ineffectual application, may be referred to without being re-stamped.
Affidavits are records of the court, and every subject has a right to a copy of them.
After an affidavit has been read and filed, it cannot be taken off the file and returned to the deponent.
[373]
The affidavit must be made before the rule is moved for. But affidavits sworn before the time of showing cause, though after the time mentioned in the rule nisi, may be received. Affidavits not filed in time may be filed *nunc pro tunc*, by leave of the court.†

On special applications to the Exchequer, the affidavit must be filed one day before the motion is made

proposed to file the affidavits intended to have been used; but the court said the accessory must follow the fate of its principal, and interdicted the filing of them.

7. REG. GEN. 9 Price, 88.

Affidavits which are to be used on special applications must, in the Exchequer, be filed one clear day before the application is made; and where notice of motion is necessary, the filing of the affidavit is to be mentioned at the foot of the notice.

IX. OF CONTRADICTORY, EXPLANATORY, AND SUPPLEMENTAL AFFIDAVITS.

1. SALLOWAY v. WHOREWOOD, M. T. 1695, K. B. 2 Salk. 461, S. P. ANON, M. T. 1800, K. B. 7 Mod. 85. REX v. BERKLEY, E. T. 1754, K. B. Ken. 31.

Upon a rule to show cause the plaintiff offered several new affidavits; but it was held, *Per Cur.* that where a motion is made upon certain affidavits, the party shall not be allowed to make use of any other deposition when cause is shown, unless such additional affidavits be merely confirmatory of what was sworn when the rule nisi was obtained.

2. ANON, M. T. 1698, K. B. 12 Mod. 326. S. P. SALLOWAY v. WHOREWOOD, M. T. 1695, K. B. 2 Salk. 461.

In this case it was said to be the practice of the Court, that, after affidavits are filed on both sides, and a day given for the hearing of counsel, there shall be no new ones read, but such as are affirming the old depositions, which Or after affidavit ought to contain no new matter.

affidavits filed, and day given for hearing counsel, none shall be read which contain new matter.

Though a rule to show cause is discharged in consequence of a false affidavit, yet the Court will not open the rule on an affidavit which disproves the former affidavit.

On a rule to show cause, affidavits in reply not admissible. Where there is an affirmative and negative affidavit, the former supercedes the latter. Affidavit not admissible where there is an erasure, &c. by mistake, in jurat. But an erasure over the jurat does not vitiate.

3. DAVIES v. COTTLE, M. T. 1791, K. B. 3 T. R. 405.

A rule to show cause why judgment should not be entered, as in case of a nonsuit, had been obtained upon the usual affidavit, stating that the plaintiff had not proceeded to trial pursuant to notice. Subsequently, however, the Court discharged the rule. Affidavits of three persons, disproving every fact, contained in the plaintiff's affidavit, were afterwards tendered. *Sed Per Cur.* If the plaintiff's affidavit be untrue he may be indicted for perjury; but its falsity is not a sufficient ground to induce the Court to re-open the matter; though, perhaps, if it had been suggested at the time that such an answer to the rule for judgment as in case of a nonsuit could have been adduced, the Court would have suspended their judgment. Rule refused.

4. SHAW v. MANSFIELD, M. T. 1819, Exch. 7 Price, 709.

On a motion made to obtain judgment as in the case of a nonsuit, the affidavit stated, that the plaintiff made default in not proceeding to trial. On showing cause against the rule, the plaintiff tendered affidavits in reply, explaining certain circumstances connected with the inquiry, which the Court rejected, observing, that affidavits in reply are not admissible.

5. RODREY v. STROUD, E. T. 1685, K. B. Comb. 18.

In this case the Court was of opinion, that where there is an affirmative affidavit and a negative affidavit, the affirmative affidavit of the plaintiffs has the preference.

X. OF INTERLINEATIONS AND ERASURES.

1. REG. GEN. M. T. 1796, K. B. 2 T. R. 82; S. P. 1820, Exch. 8 Price, 501.

No affidavit shall be read or made use of in any matter depending in the Court, in the jurat of which there shall appear any interlineation or erasure.

3. ATKINSON v. THOMPSON, H. T. 1816, K. B. 2 Chit. Rep. 19.

It appeared that there had been an erasure above the jurat, and before the words "sworn," &c. the commissioner's name having been apparently written by mistake; but Le Blanc, J. decided, that as the jurat itself in this case was without any defect, the affidavit was admissible.

XI. OF CLERICAL ERRORS AND DEFECTS, AND CONSEQUENCES THEREOF.

1. ANONYMOUS. T. T. 1772, K. B. Lofft. 275. S. P. ANONYMOUS. M. T. [375]
1772, K. B. Lofft. 85.

An objection to the words of an affidavit, that it contained no denial; the words were, "that they the deponents, nor any of them, never received." The Court held it sufficient, as the meaning was apparent. See *Champion v. Gilbert*, 4 Burr. 2127; *Hughes v. Sutton*, 3 M. & S. 178; *Bland v. Drake*, 1 Chit. Rep. 165; *Smith v. Dobson*, 2 D. & R. 420.

2. ANON. E. T. 1813, K. B. 1 Chit. Rep. 562, note.

An affidavit stating the service of a declaration in ejectment to be a "true," omitting the word "copy," was held by the Court to be sufficient. Rule refused. See *Rex v. Taylor*, Campb. 406.

3. ANON. E. T. 1815, K. B. 1 Chit. Rep. 562, note. S. P. BROMLEY v. FOSTER, H. T. 1819, K. B. 1 Chit. Rep. 562.

Two objections were taken to this affidavit; 1st, that the words "this defendant," were inserted instead of "this deponent;" 2d, the words "of the Court," instead of out "of the office;" but the Court overruled them both. such as "this defendant" for "this deponent;" or "court," instead of "office."

4. ANON. M. T. 1816, K. B. 2 Chit. Rep. 20.

Prior to making a motion, it appeared that the jurat of the affidavit was inaccurate; it was then proposed that the deposition should be received in its then imperfect state, and the time given to have it re-sworn; but, Per Bailey, J. This indulgence is never allowed except in the case of bail; notice had better be given to the opposite party, and if they proceed it will be at their peril.—Rule refused.

5. ANONYMOUS. M. T. 1822, K. B. M. S.

The Court having decided that certain affidavits tendered in support of an application were informal and defective; it was urged, that they could not be made available, even by the Court itself for its own private information; but this suggested impediment was overruled. And Bailey, J. observed, that the reasons for refusing to hear informal and untechnically drawn affidavits read was, that if the Court allowed a different practice to obtain, it would be affording encouragement to negligence and ignorance; but they were not bound totally to reject it, that they might examine the deposition with a view of satisfying their own minds.

XII. OF AMENDING AFFIDAVITS.—See also tit. Bail.

1. GOVERNOR v. FENWICK, H. T. 1701, K. B. 7 Mod. 157.

On a motion for leave to amend an affidavit which had been read in Court, and the defects pointed out by the Court; *Per Cur.* The Court seldom suffers affidavits to be amended; in this case there is no pretence, as the party knew before what was necessary for it to contain. See 1 Chit. Rep. 79; 2 id. 92.

2. WILLIAMS v. HUNT, E. T. 1819, K. B. 1 Chit. Rep. 321.

The affidavit produced in this case in support of a motion for the master to review his taxation, instead of confining itself to the precise matters, entered into a long detail of the merits of the cause. *Per Cur.* This deposition must be rejected; and, to make it available, those parts of it which are superfluous and irrelevant should be expunged.

XIII. OF THE COSTS.

- EX-PARTE HENLAN, T. T. 1819, Exch. 7 Price, 594.

The Court in this case intimated that if a party obtruded on the Court affidavits of an unnecessary length, containing superfluous matter, they should compel him to pay the costs occasioned by its improper introduction.

XIV. HOW PROVED IN EVIDENCE.

- CASBURN v. REID, H. T. 1818, C. P. 2 Moore, 60. S. P. CROKE v. DOWLING, E. T. 1748. Bul. N. P. 14.

This was a rule nisi obtained to set aside a nonsuit, in an action against a sheriff for an escape. The declaration stated, that the party was arrested "by virtue of an affidavit duly filed according to the form of the statute."

[377] &c. It appeared that at the trial the original affidavit was not produced, but only an office copy thereof, which it was contended, was sufficient; and upon the authority of *Webb v. Horn*, 1 B. & P. 261, the plaintiff was nonsuited. *Per Cur.* We are of opinion, that in this case there was no ground for a nonsuit, and that the case of *Webb v. Horn* is not applicable; consequently the only question we have to determine is, whether an examined copy of such an affidavit be or be not sufficient. Now in our opinion, there is no doubt but that the office copy was admissible evidence for the plaintiff, for if the originals were taken from the office it might be productive of great inconvenience.—Rule absolute. See 1 Phil. Ev. 309, 3d ed.

XV. FORGERY OF.

THE KING v. O'BRIAN, M. T. 1740, K. B. 2 Stra. 1144; S. C. Sess. Ca. 366. On an indictment against the defendant for intending to defraud the king, and unjustly to procure a payment to be made to the widow of an officer, stating that he had published a certain false and counterfeit affidavit, purporting to be sworn by the E. R. before a justice of the peace, by which means he received 5l. 6s. 8d. of the paymaster of the king's bounty. The crime was laid as an offence at common law. After a verdict for the king, it was moved in arrest of judgment, that the affidavit not being alleged to be forged by the defendant, was not an offence at common law, but that he ought to have been indicted on stat 23 H. 8. c. 1. for a false token.

Per Cur. Since *Ward's case*, 2 Stra. 747, this can never be doubted; and it has always been held, that the statute did not create a new offence, but only added a further punishment when the indictment is against the form of the statute. The act of 6 Eliz. c. 14. reciting the forgeries at common law, has the word *writings* in contradistinction to deeds; and it is in the election of the party in the case of forging deeds, to lay the indictment either at common law, or on the statute. Judgment for the king.

See *Jones v. Palmer*, Ca. Cro. Law, 295; 9 Geo. 3. c. 20; 2 Ld. Raym. 1461; Ray. Ent. 538; 1 Burn. 10; 2 Rep. 1618.

[378] Affidavit of Debt.

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I. BY WHOM TO BE MADE.

1. NICHOLS v. DALEHUNTY. M. T. 1738, C. P. Prac. Reg. 49; S. C. Barnes *Semb.* A person convicted of an infamous crime is incapacitated from making a valid affidavit of debt. 79. recognised in REEKS v. GRONEMON. 2 Wils. 225.

The defendant obtained a rule to show cause why he should not be discharged out of custody, on entering a common appearance. The party by whom the affidavit was made, having been sentenced to transportation, and having returned before the expiration of the appointed time had been condemned to death. The record of the conviction was read in court. The plaintiff offered to supply the defect by new affidavits, showing that the defendant had admitted the existence of the debt, and that he intended to leave the kingdom; but, *Per Cur.* This is no affidavit in law; it is a mere nullity, and the defect cannot be supplied by a subsequent affidavit.—Rule absolute. See King v. Davis, 5 Mod. 74; S. C. Holt, 501; Walker v. Kearney, 2 Stra. 1148; Lee v. Gansel, Cowp. 3.

2. HORSKEY v. SOMERS, T. T. 1758, C. P. Barnes, 116. S. P. DAVIS v. CARTER, M. T. 1695, K. B. 2 Salk. 461; S. C. 7 Mod. 75.

Motion to vacate bail, taken upon an affidavit made by the plaintiff, who had been convicted of perjury. In support of the motion the record of conviction was produced; but the court discharged the rule, observing, that although a plaintiff cannot be a witness; yet he must not be stripped of his legal remedy to recover his just debts.

3. DAVIS v. CARTER'S CASE, H. T. 1695, K. B. 2 Salk. 461.

The admission of an affidavit was opposed on the ground that the deponent had stood in the pillory. *Per Powell, J.* To support this objection you ought

to have the record of conviction in your hand. But, *Per Holt, C. J.* If the party had, it would be nothing to the purpose.

4. *Bland v. Drake*, H. T. 1819, K. B. 1 Chit. Rep. 165. S. P. *Nichols v. Dulehenty*, M. T. 1738, C. P. Prac. Reg. 49; S. C. *Barnes*, 79

When the debt is sworn to by a competent third person, it cannot be objected that the plaintiff himself is a convicted felon.

On a rule to show cause why the defendant on filing common bail should be not discharged out of custody, the affidavit appeared to have been made by a competent third person; but the plaintiff himself was a convicted and transported felon. An affidavit stating these facts was tendered; and, in support of its admissibility it was submitted, that although in general a contradictory affidavit cannot be received, yet is otherwise where the affidavit has been made by a person convicted of felony; But, *per Cur.* The affidavit is not made by the supposed felon, but by a party competent to depose on oath, and who having sworn positively to the fact, the contradictory affidavit must be rejected. See *Bolt v. Miller*, 2 B. & P. 420.

5. *King v. Lord Turner*, H. T. 1819, K. B. 1 Chit. Rep. 58.

An affidavit to hold to bail need not be necessarily made by the creditor himself.

This affidavit of debt purported to be made by a third person, and stated that the "defendant is indebted to the plaintiff in a certain sum." In support of a rule to show cause why the defendant on filing common bail should not be discharged out of custody, it was urged that the affidavit was defective, for swearing that the defendant was indebted to the plaintiff when the creditor himself resided in England. *Per Cur.* There is no case in which it has been held, that the creditor himself must swear to the debt.—Rule refused.

6. *Swayne v. Crammond*, H. T. 1791, K. B. 4 T. R. 176.

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The affidavit may be made by one of several plaintiffs;

The affidavit in this case was made by one of several assignees of a bankrupt, when it was objected that they ought to have joined in the deposition; but the validity of the suggestion was denied by the court, who observed, that if the affidavit was not received, it would in effect prevent the assignee from arresting the defendant at all, unless the others would assist him.*

7. *Pieters v. Luytjes*, E. T. 1797, C. P. 1 B. & P. 3. S. P. *Andrioni v. Morgan*, H. T. 1812, 4 Taunt. 231. *King v. Lord Turner*, H. T. 1819, 1 Chit. Rep. 58. *Brown v. Davis*, id. 161. *Lee v. Sellwood*, E. T. 1821, Exch. 9 Price, 322.

Or by a third person whose connection with the plaintiff need not be shown on the face of the affidavit.

An objection was taken to an affidavit to hold to bail, because it did not disclose any connection between the deponent and the parties suing; but *Per Cur.* If the affidavit be positive as to the existence of the debt, it is not essential that the connection between the plaintiff and deponent should appear on the face of the deposition. See *Bland v. Drake*, 1 Chit. Rep. 165; *Andrioni v. Morgan*, 4 Taunt. 230; *Knight v. Keyte*, 1 East, 415; *Elliot v. Dugan*, 2 East, 24.

8. *Brown v. Davis*, H. T. 1819, K. B. 1 Chit. Rep. 161.

Or state himself to be the plaintiff's attorney or agent;

A rule nisi was obtained to set aside a bail bond, on the ground that the affidavit to hold to bail was made by a third person, and did not state that such deponent was the attorney or agent of the plaintiff. *Per Fest, J.* As the allegation in the affidavit, that the defendant is indebted to the plaintiff in a certain sum, renders the party deposing liable to indictment for perjury, if false, it is unnecessary for the deponent to describe himself as the plaintiff's agent.—Rule refused.

9. *Andrioni v. Morgan*, H. T. 1812, C. P. 4 Taunt. 231. S. P. *Lee v. Sellwood*, E. T. 1821, Ex. 9. Price, 323.

Or the means the third person had of proving the facts;

A rule nisi was obtained to discharge the defendant out of custody. The cause of action arose upon a bill of exchange sworn to be due to A. A. a foreigner, resident abroad. The deponent swore according to the usual form, but it appeared that he could know nothing of the facts but from instructions transmitted to him here: and it was not shown on the face of the affidavit what relation the deponent bore to the plaintiff. *Per Cur.* It is not essential or requisite that the means the deponent has of obtaining a knowledge of the transaction sworn to, or that the connection between the plaintiff and the

* One of several joint creditors may arrest the debtor without the consent of his companions. See 1 Lord Raym. 380; S. C. 1 Vin. Ab. 592, pl. 16; 9 East, 491; 4 B. & A. 419.

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party making it should be known on the face of the deposition.—Rule discharged. See 1 B. & P. 1; 1 East, 415; 1 Chit. Rep. 58, 161, 165; 9 Price, 322.

10. *THE MAYOR OF LONDON V. DIAS*, H. T. 1801, K. B. 1 East, 237.

The clerk to the chamberlain of the city of London made an affidavit of debt, stating that the defendant was indebted to the mayor for use and occupation, adding, that "no offer to pay in bank notes had been made to his knowledge or belief." A rule was obtained to discharge the defendant out of custody, on the ground that the affidavit should have been made by the chamberlain. *Per Cur.* We are of opinion that the deponent is as competent to make the affidavit as the chamberlain himself, for it would be impossible for him to swear with more certainty than the party now deposing.—Rule discharged.

Or a corporate officer for a debt due to a corporation.

II. GENERAL QUALITIES OF.

(A) MUST BE POSITIVE.

1. *MOULTBY V. RICHARDSON*, T. T. 1759, K. B. 2 Burr, 1032.

A motion was made that the defendant might be discharged on common bail, the affidavit of debt being, "that the defendant was indebted to the plaintiff in such a sum as he computed it." But Mr. Justice Forster and Mr. Justice Wilmot (the only judges then in court) thought it sufficient; and they added, "that cases of this sort had gone a great way;" and intimated a disinclination to encourage such applications. See *vide Mackenzie v. Mackenzie*, 1 T. R. 716, *supra*.

2. *LONG V. LINTH*, H. T. 1771, C. P. 3 Wils. 154; S. C. 2 Bl. Rep. 740.

The plaintiff had demised to R. S. lands in Ireland for a term of years. The defendant became bound to the plaintiff by bond in the penalty of 5000*l.* conditioned, that if Stephen paid the rent to plaintiff at the days and times in the lease mentioned, the bond shall be void, otherwise in force. The plaintiff sued out a *capias ad respondendum* against the defendant, and made and filed an affidavit that the sum of 2300*l.* was due and owing to him for arrears of rent, under the said lease. It was held by three judges, *contra* Blackstone, J. that the affidavit was sufficient to hold the defendant to bail.

Although an affidavit should be positive yet stating defendant to be indebted to the plaintiff in a named sum, as "he computes it," is sufficient.*

Or that the sum of 2300*l.* is due and owing to the plaintiff for arrears of rent under a certain lease.

3. *MACKENZIE V. MACKENZIE*, E. T. 1787, K. B. 1 T. R. 716.

An affidavit was made in the following terms: "That the plaintiff's sister by her will gave and bequeathed to the plaintiff 100*l.* and directed that the same, with the other legacies, should be paid immediately after her death, and made the plaintiff's daughter residuary legatee; that the plaintiff's daughter, after proving the will, married the defendant; and afterwards the plaintiff received a letter from the defendant, containing (as the defendant mentioned in the latter) a copy of the testatrix's will, in which copy (which was written by the defendant) it was stated that the legacies were to be paid at the expiration of the twelve months after the death of the testatrix, and not immediately after that event, as the truth really is. That in the same letter, after stating securities belonging to the testatrix to the amount of 280*l.* in his custody, the defendant promised to pay the plaintiff his legacy of 100*l.* in May following; that the plaintiff, not receiving the said sum, caused several applications to be made to the defendant for payment thereof without effect; therefore the defendant is justly indebted to the plaintiff in the sum of 100*l.* for the reasons hereinbefore mentioned." This was held not sufficiently positive to hold to bail; it should have stated that the sum was still due and unpaid.

After stating the foundation of the defendant's liability; it must be shown that the debt still remains due and unpaid;

4. *WHEELER V. COPELAND*, T. T. 1793, K. B. 5 T. R. 364.

In an action for double rent under the statute, the defendant was held to bail on an affidavit, stating, that on such a day the plaintiff gave the defendant notice to quit on, &c. and that the latter held over, notwithstanding; by reason of which, and by force of the statute, an action had accrued to the plaintiff to recover from the defendant 108*l.* &c. *Per Cur.* The affidavit does not state that the defendant is indebted in a certain sum to the plaintiff; it is only argumentative, which is not sufficient in an affidavit to hold to bail.

And contains a positive allegation that the defendant is indebted. Merely concluding the affidavit, after stating certain facts "that

* On this case being cited in *Pollery v. Da Souza*, 4 Taunt. 154, the Court said there must be some gross inaccuracy in the report.

by reason whereof the defendant stands indebted," is bad, as the words "by reason whereof," are not a positive averment but a recital.

5. FOWLER v. MORTON, M. T. 1799, C. P. 2 B. & P. 48.

The affidavit in this case, after stating the circumstances under which the debt accrued, concluded thus: "By reason whereof the said C. M. became indebted to the deponent in, &c. and by reason whereof the said C. M. now is and standeth justly and truly indebted to him, the deponent, in the said sum, which he hath refused and still refuses to pay." It was objected, and the validity of the objection admitted by the Court, that the words "by reason whereof," made it a recital, and not a positive statement of the defendant.

6. CLAPHAMSON v. BOWMAN, E. T. 1744, K. B. 2 Stra. 1226 ROIS v. BELIFANTE, E. T. 1743, K. B. 2 Stra. 1209, S. P. POMF v. LUDVIGSON, M. T. 1758, K. B. 2 Burr, 655. VAN MORSELL v. JULIAN, M. T. 1748, C. P. 1 Wils. 231.

The plaintiff's book-keeper swore that the defendant was indebted to the plaintiff in 3400*l.* for money had and received by the defendant to the use of the plaintiff, as this deponent verily believes, and the court held it insufficient to hold the defendant to bail.

7. WATERS v. JOYCE, H. T. 1822, K. D. 1 D. & R. 150.

The affidavit to hold to bail in this action was objected to as defective. It stated that Edward Joyce was indebted to the plaintiff in the sum of —, being the amount due to plaintiff from the said George Page Edward Joyce, for his subscription as member of a certain reading club, according to the rules and regulations of the said club. *Per Cur.* The affidavit is clearly bad, both in substance and in form. The latter part of the affidavit, with reference to the certainty of the party supposed to be indebted, is the most material; and there the defendant is described by four names, and it is consequently irregular, as it might be inferred that another person was jointly indebted with the defendant to the plaintiff. The substance of the deposition is likewise invalid, as it is alleged that the debt arose in respect of the defendant's subscription as a member of a certain reading club; for the breach of such an agreement does not entitle the plaintiff to arrest the defendant. Rule absolute. See 3 Burr. 1417, 1687.

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An affidavit that E. J. is indebted to plaintiff in the sum of —, being the amount due to plaintiff from the said G. P. E. J. for his subscription as member of a certain reading club, according to the rules & regulations of the same," is bad, both in substance and form.

(B) PERFECT IN ITSELF.

1. HEATHCOTE v. GOSLIN, T. T. 1780, K. B. 2 Stra. 1157; S. C. 7 Mod. 336.

The affidavit stated, that the defendant had borrowed 2000*l.* of the plaintiff on bottomry, "which money is now due and owing to this deponent, by virtue of the said bond, as thereby may appear." It was objected, on behalf of the defendant, that the affidavit was defective, as the whole of the debt might have been paid, and a separate receipt taken for the amount, yet on the face of the bond the whole would appear unliquidated. The Court concurred in this suggestion, and the plaintiff offered a supplemental affidavit, but the Court refused to receive it, for the statute requires a positive verification of the debt prior to suing out the process. The defendant was discharged on common bail.

The affidavit must be perfect in itself, and not refer to other documents; thus where it stated that the defendant had borrowed 2000*l.* of the plaintiff on bottomry, "which money was then due and owing to the deponent by virtue of a certain bond, as thereby might appear," it was holden bad;

Or alleging that the defendant is indebted to deponent in a named sum, as appears by his books. Or as appears by an account stated between the parties;

2. WALROND v. FRANSHAM, H. T. 1744, K. B. 2 Stra. 1219.

An executrix swore that the defendant was indebted to her testator in a named sum, as appeared by his books. The affidavit was held insufficient, and deponent in common bail ordered.

3. SWARBRECK v. WHEELER, M. T. 1758, C. P. Barnes, 100.

The affidavit to hold to bail was made by a third person, it stated that the defendant was indebted to the plaintiff in 500*l.* "as appears by a stated account attested by the consul at Oporto;" upon which the defendant's counsel obtained a rule to show cause why a common appearance should not be entered, on the ground that the affidavit was insufficient; but upon the defect being supplied by a supplementary deposition that the defendant had acknowledged the accuracy of the stated account, the Court discharged the rule.

4. JENRINGS v. MARTIN, M. T. 1763, K. B. 3 Burr. 1447.

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A rule was obtained to show cause why the defendant should not be discharged on common bail, the plaintiff's affidavit being defective, as it merely stated that the defendant was indebted to him in a named sum, "as appears by an agreement bearing date on," &c. It was contended that it was a general principle that the affidavit should be perfect in itself, and not refer to facts to be ascertained from collateral sources. (1 Wils. 121. 299.) Per Mansfield, C. J. As this is a settled point, it must, of course, be adhered to; but I own I am not satisfied with the reason of it; for if the party swears positively that the defendant is indebted to him in a named sum, his adding words of reference cannot excuse him from the penalties of perjury if it be untrue. But Mr. Justice Denison observed, that vast numbers of such affidavits had been rejected, and the defendants had always been discharged on common bail when the depositions were only expressed in terms of reference. Rule absolute.

5. BRIGHT v. PURRIER, E. T. 1765, K. B. 3 Burr. 1687.

In an action on a bill of exchange, a motion was made that the defendant should be discharged on common bail, as the affidavit only stated, "as appears by a bill of exchange," &c. The Court made the rule absolute.

6. POWELL v. PORTHERCH, T. T. 1787, K. B. 2 T. R. 55.

The affidavit alleged that the defendant was indebted to the deponent a certain sum, "as appears by the master's *allocatur*." The Court discharged the defendant on common bail.

7. WILLIAMS v. JACKSON, H. T. 1790, K. B. 3 T. R. 575.

The affidavit was in these words: "J. J. is justly indebted unto this deponent in the sum of 20*l*. and upwards, according to the bill of this deponent delivered to the said J. J. which is for work and labour," &c. The Court were clearly of opinion that the debt was not positively sworn to, and discharged the defendant on common bail.

8. TRIBE AND OTHERS v. PRATT, H. T. 1742, C. P. Barnes, 91.

One of several assignees of a bankrupt made an affidavit that the defendant was indebted to the plaintiffs in 1300*l*. "as appeared by an account under the bankrupt's hand." Upon the production of this deposition, it was contended that the account referred to by it was not annexed or adduced; that as the bankrupt was living, and under the control of the assignees, he ought to have joined in the affidavit; and that the deponent who actually made it does not swear that he believes the sum to be due. The Court being of opinion that a more positive affidavit was necessary, unless it could be shown that the bankrupt had refused to make one, made the rule absolute for entering common appearance.

(C) EXCEPTION TO THE RULE THAT THE AFFIDAVIT MUST BE POSITIVE.

1. BARCLAY ET AL. ASSIGNEES v. HUNT, M. T. 1766, K. B. 4. Burr. 1992, S.

P. TONNA v. EDWARDS, H. T. 1768, 4 Burr. 2283.

In an action by the assignees of a bankrupt, they swore that the defendant was indebted in these words: "as appears to these deponents by the last examination of the bankrupt, and as these deponents verily believe." And they deposed that they themselves had not received the debt, or any part of it, and that they believed it to be still due. An objection was taken to its sufficiency, and a motion made to discharge the defendant on filing common bail; but the Court after taking time to consider, was decidedly of opinion that the affidavit was sufficiently positive, for it observed, that they ought never to lay down a principle to be construed so rigidly, as to put unreasonable difficulties in the way of suitors, and render them subject to even greater inconveniences than the rule itself was intended to avoid.

2. SWAYNE v. CRAMMAND, H. T. 1791, K. B. 4 T. R. 176.

Three assignees of a bankrupt brought an action against the defendant to recover a debt. One of them made an affidavit that the defendant was indebted to the plaintiff for goods sold, as appeared by the bankrupt's books, and as

Or as appears by an agreement bearing date &c.

Or as appears by a bill of Exchange;

Or as appears by the master's *allocatur*;

Or as appears by a bill delivered to the defendant;

Or when made by one of several assignees, of a bankrupt "as appears by an account under the bankrupt's hand."

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It is sufficient if the assignee of a bankrupt swears to the best of his belief; Or as appears by the bankrupt's books, subjoining an allegation of the assignee's belief.

the deponent believed. On an objection being made to discharge the defendant out of custody, the Court held the affidavit sufficient, and refused the motion.

3. *LOWE v. FARLEY*, H. T. 1819, K. B. 1 Chit. Rep. 92.

The latter
averment is
essential.

In an action by the assignees of a bankrupt, the affidavit appeared to have been made by a clerk of the bankrupt, and stated that "the defendant was indebted, as appeared by the bankrupt's books." A rule was obtained for the defendant's discharge on filing common bail, as the affidavit did not contain an averment of the deponent's belief that the debt was due. Rule absolute.

4. *SHELDON v. BAKER*, H. T. 1786, K. B. 1 T. R. 87. *S. P. MACKENSIE v. MACKENSIE*, M. T. 1786, K. B. id. 716.

An execu-
tor or ad-
ministrato-
r swear-
ing to be-
lieve is suf-
ficient.

The executor of W. S. brought an action against the defendant to recover a debt due to his testator. The affidavit was expressed in the following words: "That the defendant is justly and truly indebted unto this deponent as the sole executor of W. S. in 1000*l.* and upwards, for money had and received by the defendant as receiver of the rents and profits of the said W. S. deceased, as appears to this deponent to be the true balance upon the said defendant's stewardship account by him delivered to this deponent, as executor of the said W. S. and from the several articles of disbursement therein contained having been carefully examined with the vouchers." The deponent's belief of the truth was not subjoined. *Per Cur.* The cases of assignees, executors, &c. are exceptions to the general rule, that the affidavit must be positive; in such instances if he swears that he believes the statement to be true, it is as much as can be required, because the transactions which in general give rise to such claims are not usually within his own immediate cognizance. The deponent's belief should have been added; as that allegation is omitted, the defendant must be discharged. Rule absolute.

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But an affi-
davit by an
executor of
a debt due
to his testa-
tor, as ap-
pears from
a statement
made from
the testa-
tor's books
by an ac-
countant
employed
by the de-
ponent is
sufficient.

5. *ROWNEY v. DEAN*, T. T. 1815, Exch. 1 Price. 402.

Cause was shown against a rule obtained for delivering up the bail bond given by the defendant, on an objection of insufficiency in the affidavit of debt, wherein it was sworn by the plaintiff, that the defendant was indebted to the plaintiff as executor, &c. "as appears to this deponent from a statement made from the books and accounts of the said M. Dean, deceased, by W. K. an accountant employed by this deponent to investigate the same, as this deponent verily believes." It was submitted that the plaintiff, in his character of executor, should be permitted to depose to a debt due to his testator in the most cautious manner. And the Court ruled, that an affidavit in the preceding terms was insufficient to hold the defendant to bail.

6. *BLAND v. DRAKE*, H. T. 1719, K. B. 1 Chit Rep. 165. *S. P. CASS v. LEVY*, K. B. 8 T. R. 520. *KNIGHT v. KEYTE*, E. T. 1801, K. B. 1 East, 415. *KING v. LORD TURNER*, H. T. 1819, K. B. 1 Chit. Rep. 158.

An agent
swearing to
believe when
his principal
is resident in a
foreign
country is
sufficient.

A rule had been obtained to shew cause why the defendant, on filing common bail, should not be discharged out of custody, the affidavit being sworn by a third person, who only deposed to his belief in the following manner; that "the defendant was indebted to W. B. the plaintiff, on a judgment recovered in a colonial court against the said defendant;" adding, "that the judgment was still in force, unpaid and unsatisfied, as deponent verily believed." *Per Best, J.* If it were to be holden that the present affidavit is insufficient, the defect could not be supplied; for if any agent here, whose principal is abroad, swears that he believes the debt to be due, it is the highest evidence of the existence of a debt which the nature of the transaction will admit. It would be an exceedingly mischievous doctrine to lay down, that such affidavits are insufficient. It was afterwards observed by the Court, that the deponent

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* Where an agent making an affidavit swears positively to the different facts, the absence of the creditor from this country need not be alleged, *Knigh v. Keyte*. 1 East, 415; nor need the affidavit declare his means of knowing the facts sworn to; *Picters v. Luytjes*, 1 B. & P. 1; *Andrioni v. Morgan*, 4 Taunt. 231; *Lee v. Sellwood*, 9 Price, 323. The above exceptions are the *ne plus ultra*; other cases standing in *pari ratione* require the same relaxation of the general practice, and must be governed by similar rules. See *Petersdorff on Bail*, 145.

had not sworn merely to belief, but had in positive terms stated that the debt was subsisting. He had taken upon himself to swear positively that the money is still due. See *VAN MORSELL v. JULIAN*, 1 Wils. 231.

7. *HOBSON AND ANOTHER v. CAMPBELL*, T. T. 1789, K. B. 1 H. Bl. 245.

An affidavit to hold to bail stated, that the defendant was indebted to the deponent in the sum of 17,000*l.* and upwards, principal and interest upon certain bonds, stating the dates, parties, and sums, the conditions of which bonds were for the payment of certain bills of exchange drawn in England on A. in the East Indies, in case they should be returned to England, protested for non-payment; and then stated that none of the said bills of exchange were, to his (the deponent's) knowledge or belief, paid in India, but that such bills were respectively protested in India for non-acceptance, and that the same were then unpaid. To this affidavit it was objected that it was insufficient as it only averred the knowledge and belief to the plaintiff, and that by the condition of the bond the bills were to be returned protested for non-payment, but the affidavit stated them to be returned protested for non-acceptance. The Court were of opinion that the affidavit was sufficiently positive, as far as it stated the knowledge or belief of the deponent that the bills were unpaid, for a more positive allegation is not requisite where, from the nature of the question, the party can only have grounds of belief, and cannot make a distinct assertion. But from the condition of the bonds set out, it appeared that the affidavit introduced another term into them, namely, that of the bills being returned protested for non-acceptance, which was a material variance, and rendered the affidavit bad. But in this case the Court would have allowed a supplementary affidavit.

8. *MALLING v. BUCKHOLTZ*, E. T. 1814, K. B. 2 M. & S. 563.

The defendant had been holden to bail in trover under a judge's order, founded on an affidavit which stated that the defendant had converted the property to his own use, "as appears by the books of accounts of W. and others, as this deponent believes." The Court made a rule absolute for discharging the defendant on common bail; Lord Ellenborough, C. J. observing, that if the matter of the affidavit be vouched by reference only to documents, and by the voucher and substantive belief of the party who deposes, the Court would not be inclined to act upon it.

9. *LOVELAND v. BASSET*, T. T. 1742, cited by Mr Ford in *VAN MORSELL v. JULIAN*, K. B. 1 Wils. 231.

The assignee of a bond swore that the obligor was indebted in 90*l.* for principal and interest upon the bond, as he believed, and held sufficient.

10. *W. CRESSWELL v. LOVELL AND ANOTHER*, M. T. 1799, K. B. 8 T. R. 418.

An affidavit to hold to bail stated, that this deponent verily believes that Lovell is indebted to one W. C. in a certain sum, as indorsee of four several bills of exchange, accepted by the said defendants, and drawn by the defendants on one J. C. the payment of which was refused by the acceptor; and further, that the defendants, being so indebted, the said W. C. did on, &c. duly assign his interest in the said debt so due on the said bills to this deponent, and which said bills of exchange are now in the custody of this deponent; and further, that subsequent to the assignment from the said W. C. to him, this deponent, he, the deponent, hath assigned two thirty parts or shares of his interest of the said debt to J. J. and T. H. &c. And further, that he hath not received any part of the said sum on the said bills, nor have the said W. C., F. F., or T. H., to the knowledge or belief of this deponent, and that the said defendants are now indebted unto this deponent, and the said F. F. and T. H. as assignees as aforesaid, concluding with negating any tender to the deponent in bank notes, or to the parties interested, to the best of his knowledge and belief. On a rule to shew cause why the defendant, on filing common bail, should not be discharged out of custody. *Per Cur.* If the person who is beneficially interested in the notes, and in whose possession they now are, swears positively as to those facts which are within his knowledge, and to the best of his belief as to the rest, it is sufficient, though affidavits to hold to bail

When the cause of action is derived from the nonpayment of bills in India, it is sufficient for the party to swear that they were not paid to the deponent's knowledge and belief in India or elsewhere but that they were protested for non-acceptance in India, and still unpaid. Where the belief of the deponent is admitted, it must be his own substantive persuasion of the truth of the facts stated, and not a belief drawn from the inspection of documents, &c. The assignee of a debt may swear to belief; [389] Or to such facts as are within the knowledge of his principal or co-assignee, but he must swear positively to all facts of which he is himself cognizant.

The assignee must show that the debt has not been paid between the time of making the affidavit and the assignment.

[390] Although usual, the concurrent affidavit of the assignee and obligee of a bond, are not absolutely necessary. Saying "on promises generally" is not sufficiently explicit; Or stating that the defendant is indebted in a certain sum, not showing how the debt arose; Or in so much upon a breach of articles; Or upon a bond for performance of covenants; Or upon an agreement not showing how it was infringed.

[391] Demands owing to several distinct plaintiffs cannot

must in general be positive; yet the courts, from necessity, have relaxed the rule in the instance of assignees of bankrupts and executors, who are only required to swear to the best of their knowledge or belief.—Rule discharged. See 4 T. R. 2 B. & P. 353; and as to the legality of the assignment of choses of action in general, Chitty on bills, 59. 6th edit.

11. MANN v. SHERIFF, H. T. 1801, B. P. 2 B. & P. 355.

The deponent alleged that the defendant, "at the time of making the assignment hereafter mentioned, was justly and truly indebted to the plaintiff, &c." but did not proceed to aver that he was indebted at the time of making the affidavit. The omission was held fatal; and Lord Eldon, C. J. remarked, that the affidavit on such a debt ought not to leave it open to be inferred that the demand has been satisfied between the interval that has elapsed from the period of granting the assignment to the time of making the affidavit. Such an inference should be repelled, by expressly negating that any thing has been paid to the deponent posterior to the assignment.

12. RYLAND v. KING, H. T. 1817, C. P. 1 B. Moore, 25.

The plaintiff, as assignee of a bond, deposed that the defendant was indebted to B. and S. B. in the sum of 3000*l.* for principal and interest, due on a bond, bearing date, &c. and entered into by the defendant to B. & S. B. in the penal sum of 6000*l.* and which bond had been duly assigned to deponent, and that no tender, &c. had been made. *Per Cur.* Although it is usual for an affidavit, yet the deposition of the assignee being positive, the informality is aided.

(D) MUST BE EXPRESS, CERTAIN, AND EXPLICIT.

1. COPE v. COOKE, M. T. 1780, K. B. 2 Doug. 467.

The affidavit stated "that the defendant was indebted to the plaintiff in 200*l.* upon promises." The Court considered this affidavit too general, but refused to allow the defendant the costs of the application.

2. COOKE v. DOBREE, E. T. 1788. C. P. 1 H. Bl. 10.

To an affidavit deposing that the defendant was indebted to the plaintiff "in the sum of 500*l.* and upwards," it was objected that the deposition had not disclosed how the debt had arisen; the Court considered the omission fatal, and discharged the defendant on common bail.

3. BOOKER v. FRIEND, T. T. 1750, C. P. Cited in ARCHER v. ELLARD. Say. 109.

The affidavit alleged that the defendant was indebted to the plaintiff in the sum of 200*l.* upon breach of articles; but no particular breach of the stipulation was shown. The affidavit was on this ground holden insufficient.

4. ARCHER v. ELLARD, T. T. 1754, C. P. Sayer. 109.

Per Cur. If an action be brought upon a bond for the payment of money, it is not enough that the affidavit for holding to special bail state the penalty of the bond, but it must likewise explicitly show the sum due upon the instrument for principal and interest.

5. STINTON v. HUGHES, M. T. 1794, K. B. 6 T. R. 13.

An affidavit to hold to bail stated, that "the defendant is indebted to the deponent in 50*l.* under a certain agreement in writing, dated," &c. by which the defendant agreed to forfeit the sum of 50*l.* A rule was obtained to show cause why the *ac etiam* part of the writ should not be struck out, and the defendant was discharged on common bail. *Per Cur.* This is in the nature of a contract for stipulated damages; the plaintiff should have shown the breach of the agreement, and having omitted to do so, the defendant must be discharged out of custody on filing common bail; but striking out the *ac etiam* part of the writ is unnecessary. As to the difference between stipulated damages and a penalty, see Holt, N. P. Rep. 45. n.

6. FOWLER v. MORTON, M. T. 1799, C. P. 2 B. B. & P. 84.

On a rule to show cause why the defendant should not be discharged out of

* The usual practice in cases where the action is upon a bond is for the obligee and assignee to join in an affidavit, stating the execution and assignment of the instrument, and in the same the amount then due for principal and interest. Pettersdorff on Bail, 147; Form Tidd's affidavit. App. 99. 5th edit.

custody on entering a common appearance, it appeared that the affidavit of debt, after stating the circumstances under which the debt accrued, concluded "by reason whereof the defendant stands indebted in a certain sum, which he hath refused, and still refuses to pay." In support of the rule it was urged, that the debt was not sworn to positively, on account of the words "by reason whereof." In which opinion the court concurred, and made the rule absolute.

7. *POLLERI v. DE SOUZA*, M. T. 1811, C. P. 4 Taunt. 154.

The affidavit to hold to bail was objected to as it merely stated that defendant was indebted to L. P. in a specified sum on the balance of accounts between the parties, without showing on what account it was due. A rule nisi was obtained to cancel the bail bond, and afterwards made absolute. On *Moulton v. Richardson*, 2 Burr, 1033, being quoted, the Court said that there must be gross inaccuracy in the report of that case.

8. *JENKINS v. LAW*, H. T. 1799, C. P. 1 B. & P. 365.

This affidavit described the debt as for "damages awarded, and costs and expenses taxed and allowed." In support of a rule nisi for defendant's discharge, on entering a common appearance, it was contended that it did not appear from the affidavit that the award and taxation had been made by competent authority. *Sed Per Cur.* We think that word "awarded" must be taken in its legal sense; and the affidavit, on the whole, sufficiently discloses a cause of action.—Rule discharged.

(E) MUST BE INTELLIGIBLE.

1. *REEKS v. GRONEMAN*, H. T. 1764, C. P. 2 Wils. 224.

The affidavit stated that Fidocus Groneman in justly indebted to this deponent in the sum of 12*l.* 16*s.* 8*d.* for lodgings and necessaries found and provided by this deponent for the said Fidocus Groneman; it was objected that this was no deposition as to the existence of the debt, it being said that the defendant in justly instead of is justly indebted; and after cause shown against the rule, the defendant was discharged.

2. *CHAMPION v. GILBERT*, T. T. 1765, K. B. 4 Burr. 2127.

The words of the affidavit were, "that the defendant is justly and truly indebted to this affirmant in the sum of 5000*l.* for so much money had and received of this affirmant, and for which he has not accounted." The Court held that these last words rendered the deposition not positive; and the defendant was accordingly discharged on common bail.

3. *IMLAY v. ELLESPEN*, T. T. 1802, K. B. 2 East, 453.

A rule was obtained to show cause why the defendant should not be discharged out of custody on filing common bail, on the ground that the affidavit of debt was argumentative. It stated, "that the defendant was indebted to the plaintiff in a certain sum, being the value of goods (specifying them) delivered by the plaintiff to the defendant, to be by him carried and delivered to J. W. for the use and on the account of the plaintiff. *Per Cur.* The affidavit is sufficient, although the term "indebted" is, with reference to the nature of the transaction, an untechnical expression. The affidavit shows that the plaintiff has been injured to the amount sworn to, and that word is merely used to express the amount of the damnification. Rule discharged. See *O'Mealy v. Newell*, 8 East, 364.

4. *HUGHES v. SUTTON*, M. T. 1814, K. B. 3 M. & S. 178.

On an application to set aside a bail bond, it appeared that the affidavit alleged "that Randle Sutton, the defendant, is indebted to the plaintiff for money paid and laid out to the use of the said Randle Jackson." *Per Cur.* The word Jackson is superfluous, and unconnected with any former part of the deposition; it cannot vitiate.—Rule refused.

5. *BLAND v. DRAKE*, H. T. 1819, K. B. 1 Chit. Rep. 165.

The affidavit in this case was made by a third person, and stated that the defendant was justly and truly indebted unto the plaintiff in the sum of, &c. upon, and by virtue of a judgment of the Supreme Court of Judicature, in viâ con-

tains a positive averment that the defendant is justly indebted to the plaintiff on a judgment recovered in a colonial court in a subsequent allegation that it is in force and unpaid as deponent believes, does not invalidate.

and for New South Wales, recovered by the plaintiff against the defendant, which said judgment is still in force, unpaid, and unsatisfied, "as the deponent verily believes." *Per Cur.* The affidavit contains a positive averment, that the defendant is justly indebted to the plaintiff on the judgment. The words "which judgment remains in force unpaid and unsatisfied," form a new sentence unconnected with the previous positive averment, that the money is due.

Semb. An allegation in affidavit of debt "that a notary public was sworn to interpret" is sufficient without alleging that "he had interpreted." Debt and *assumpsit* cannot be joined in one affidavit.

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On a cause of action against several distinct defendants.

As the maker and indorser of a promissory note. In penal actions where several persons have separately incurred penalties, they cannot be arrested on one affidavit comprising all of them. But an affidavit on a penal statute may, however, include several offences committed by the same defendant.

6. ANON, M. T. 1813, K. B. 1 Chit. Rep. 660, note.

A rule to show cause was granted, why, on filing common bail, the defendant should not be discharged out of custody, the jurat having stated "that a notary public had read over the affidavit to the plaintiff, and that the notary had been duly sworn to interpret," but it did not allege "that he had interpreted."

(F) MUST BE SINGLE.

1. CROKE V. DAVIS, M. T. 1770, K. B. 5 Burr. 2690.
The affidavit to hold to bail was on one stamp, and joined together a debt on bond for 800*l.* and an *assumpsit* for 150*l.* It was objected, that if such affidavit were received the practice would lead to frauds on the stamp duties, and might possibly operate as a vexatious and oppressive mode of proceeding to the defendant. The Court ordered the defendants to be discharged in both actions; but did not lay much stress upon the objection of its being a fraud on the stamp duty.
2. GILBY V. LOCKYER, T. T. 1779, K. B. 1 Doug. 217, S. P. HOLLAND V. JOHNSON, 4 T. R. 695.

On a motion to set aside the proceedings in a cause for irregularity, it appeared that the defendant and two other persons had been held to bail in separate actions upon one affidavit. *Per Cur.* We are of opinion, that the practice of inserting more than one defendant in the same affidavit has prevailed, it has been without our sanction or knowledge, as we decidedly disapprove of it, and consider it as contrary to the meaning of the acts of parliament, regulating the law of arrest, and a fraud upon the stamp duties. Proceedings set aside.

3. HUSSEY V. WILSON, E. T. 1793, K. B. 5 T. R. 254.
The maker and indorser of a promissory note were both held to bail on one affidavit, to which only one stamp was affixed, and both defendants included in the same writ, with several *ac etiams*. A motion was made to set aside the bail bond, on the ground of this irregularity. The motion was opposed by the plaintiff, on the suggestion that the defendant had waived the irregularity by putting in bail above; but, *Per Cur.* This being a complete defect in the proceedings, it cannot be cured by an act of the party. Rule absolute.
4. GOODWIN V. PARRY, H. T. 1792, K. B. 4 T. R. 577.

The plaintiff had filed one affidavit, in order to hold the defendants to bail, on the 27 G. 3, c. 112, for printing illegal schemes in the lottery, and had sued out one writ against them all, but had declared against each separately. The Court discharged the defendants on common bail observing that such a practice would impose on each defendant the necessary expense of taking copies of those parts of the affidavits relating to offences not individually imputed to them.

HOLLAND, *qui tam*, v. BOTHMAR, E. T. 1791, K. B. 4 T. R. 228.
This action was on the lottery act, 22 G. 3, c. 47, to recover several penalties for insuring several tickets to different persons; and the affidavits alleged, that the defendant had promised and agreed to pay those several persons divers sums of money on certain events, &c. It was objected that the affidavit included separate offences, by insuring with several persons. But the Court thought there was no foundation for the objection, and held the affidavit sufficient. See *King v. Cole*, 6 T. R. 640.

6. DEAN AND CHAPTER OF EXETER v. SEAGELL, E. T. 1796, K. B. 6 T. R. 688. [394]

The defendant had been arrested on an affidavit, which stated that A. is indebted to B. in a certain sum, and to C. in a certain other sum; but only one writ was issued out, and that in the name of B.; and no proceedings, except the above affidavit, were had by C. On a rule being obtained to show cause why the proceedings should not be set aside, it was said, *Per Cur.* We cannot suffer two causes of action to be joined in the same affidavit; such a practice would be sanctioning a direct fraud on the stamp duties.

7. HUSSEY v. WILSON, E. T. 1793, K. B. 5 T. R. 254: S. P. GOODWIN v. PARRY, H. T. 1792, K. B. 4 T. R. 577.

The affidavit was against the maker and endorser of a promissory note, and only one stamp affixed. The writ was also against the same parties, with several *ac etiams*. It was argued that the irregularity in the proceeding was waived by the defendant having put in bail. *Sed per Cur.* This is a complete defect in the proceeding, and cannot be waived by the adverse party. See *D'Argent v. Vivant*, 1 East, 330.

(G) MUST CORRESPOND WITH THE PROCESS IN THE DESCRIPTION OF THE PARTIES.

1. SPALDING v. MURE, T. T. 1795, K. B. 6 T. R. 363.

The plaintiff sued out an original writ against three-defendants, in which was a set of counts against them as surviving partners of G. and another set against them in their own right only. Two of the defendants were outlawed, and the third was held to bail in 20,000*l.* for money had and received by the four partners, G. being dead. The declaration contained counts against the defendants in their own right, without saying that they were the surviving partners of G. Whereupon it was moved that an exoneretur might be entered on the bail piece. *Per Cur.* The plaintiffs have forfeited their right to bail by the variation between the affidavit and the declaration. The rule was made absolute on the defendants filing common bail.

2. ATWOOD v. RATTENBURY, H. T. 1821, C. P. 5 B. Moore, 209.

A motion was made for the defendant's discharge on common bail, and delivering up of the bail bond to be cancelled. The plaintiffs' having described themselves in the writ and declaration as suing in their own right, and in the affidavit as surviving partners; the Court made the rule absolute, observing that if the defendant was originally indebted to these persons for money lent, one of whom had since died, the loan stated in the affidavit, and the one stated in the declaration, would appear to be a distinct and different transaction. See *Christie v. Walker*, 1 Bing, 68.

3. CLARKE v. BAKER, H. T. 1811, K. B. 13 East, 272.

In the affidavit to hold to bail the defendant was called Thomas Baker; but in the declaration against him he was designated by the name of Charles; the Court admitted that if the application had been made in time, and before bail put in by the name of Charles, he would have been entitled to his discharge; but that the bail could not object that that was not his true name after they had admitted the correctness of the designation by entering into the recognizance. See *Johnson v. Cooper*, 5 B. Moore, 472.

4. ——— v. REYNOLDS, H. T. 1805, K. B. 1 Chit. Rep. 659, note.

The defendant applied to be discharged on filing common bail, on the ground of a variance between the writ and the affidavit of debt; the former described the defendant by the name of Rennolls; the latter by the name of Rennoll, omitting the s, which was contended to be an incurable defect; but, *Per Cur.* The omission of a single letter in the spelling a name is not a sufficient ground to authorize us to discharge the defendant. Rule refused.

* In *Dalton v. Barnes*, 1 M. & S. 280, Mr. Justice Bayley observed that there was not any instance in which the party, after putting in bail above, had been permitted to take advantage of a defect in the affidavit to hold to bail.

† As to the principal point, decided in *Spalding v. Mure*; see *Richard v. Heather*, 1 B. & A. 29, where it was held, that under a declaration containing only one set of counts, charging the defendant in his own right, the plaintiff might recover one demand from the defendant individually, and another due from him as a surviving partner. But where a party sues as a surviving partner, he must be described as such in the declaration. See *Jell v. Douglas*, 4 B. & A. 374, *post*, tit. Partner.

Demands owing to several distinct plain tiffs cannot be included in the same affidavit.

A deviation from the rule, that the affidavit must be single is an incurable defect, and not waived by putting in bail.*

An affidavit describing the defendant as surviving partner, and the declaration charging him in his individual capacity, is a fatal variance, and the defendant will be discharged on common bail.†

[395] Or if the plaintiff be described as surviving partner and the declaration be in his own right.

A material variance in the name of the defendant, between the affidavit and declaration, will entitle him to his discharge, But a slight difference in spelling the defendant's name, as Renoll for Rennolls,

Or misspel
ling the fin
al syllable,
by inserting
"rum" in
stead of
"run,"
does not vi
tiate.

5. ANON, M. T. 1813, K. B. 1 Chit. Rep. 660, note.

A rule was granted by Le Blanc, J. to show cause why, on filing common bail, the defendant should not be discharged out of custody on the ground of the final syllable of the defendant's name being misspelt, as "rum" instead of "run" at the same time observing that he considered the discrepancy immaterial. See *Binfield v. Maxwell*, 15 East, 153; *Hole v. Finch*, 2 Wils. 303.

(H) MUST CORRESPOND WITH THE PROCESS IN THE SUBJECT MATTER OF THE SUIT.

1. WILKS V. ADOCK, M. T. 1798, K. B. 8 T. R. 27.

Describing
the instru
ment as a
bill of ex
change on
affidavit
and declar
ing on it as
a special
contract is
a fatal vari
ance.

A rule to shew cause was obtained why the bail bond given in this cause should not be cancelled on the defendant entering a common appearance. The affidavit to hold to bail having described the subject matter of the suit as a bill of exchange, and the plaintiff's declaration having shown that it was a special order for the payment of money, and not a negotiable security. The Court considering the objection fatal, made the rule absolute for the defendant's discharge.

2. GOULD V. LOGETTE, M. T. 1819, K. B. 1 Chit. Rep. 659.

[396]
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This was an application for leave to enter an exonereter on the bail piece on the ground of a variance between the declaration and the affidavit to hold to bail. The affidavit was on a bill of exchange for 523l. 17s. 6d. and the declaration described the instrument as a bill of exchange for 523 livres, 17 sous, 6 deniers, being of the value of 523l. 17s. 6d. sterling. *Per Cur.* This cannot be considered a variance, because the value of the money described in the affidavit to hold to bail, and that set out in the declaration, are the same in substance and effect. Rule discharged with costs.

3. WHEELWRIGHT V. JUTTING, 1 B. Moore, 51; S. C. 7 Taunt. 304.

The affidavit stated that the defendant was indebted to the plaintiff in a bill of exchange, and a general verdict was found, as well for goods sold, as in respect of the bill; it was submitted that the plaintiff could not, by combining other causes of action against the principal, transfer the liability of the bail to other claims not disclosed in the affidavit, and for which they had not become responsible. *Per Dallas, C. J.* When we look to what is technical, we find no difference of opinion in the officers or in the Court; when we look to the books of practice, the text is positive; when we look to the reason of the thing it is, that if bail are told there is a debt of 167l. due on a bill of exchange, they shall not be liable for goods sold and delivered. The bail ought to know the extent of their responsibility. See *Caswell v. Coare*, 2.

4. BROOKES V. CLARKE, M. T. 1822, K. B. 2 D. & R. 148.

A motion was made for a rule nisi to cancel the bail bond, and to set all proceedings in the cause aside. It was stated in the affidavit of debt, that the defendant was indebted to the plaintiff on a bill of exchange, drawn by the defendant, and accepted by the plaintiff for the honour of the defendant; and "which said bill of exchange was paid by this deponent." The declaration was only on the money counts. Two objections were raised, that the declaration did not agree with the affidavit to hold to bail. *Per Cur.* The debt is described with sufficient precision for the information of the defendant. There is no material variance between the affidavit and declaration, because money paid on a bill under circumstances similar to the present may be clearly recovered on account for money paid to the defendant's use. Rule refused.

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irregular.

(I) MUST CORRESPOND WITH THE PROCESS IN THE FORM OF ACTION.

TETHERINGTON V. GOULDING, M. T. 1796, K. B. 7 T. R. 80. S. P. MABERLY V. BINTON, E. T. C. P. 5 B. Moore, 483.

The plaintiff having held the defendant to bail on an affidavit in assumpsit, delivered a declaration in trover; whereupon a rule was obtained to enter an exoneretur on the bail piece. The Court considered the proceedings irregular, the declaration not being by the bye, made the rule absolute. See 2 H. Bl. 278; 2 B. & P. 358.

(J) WHEN TWO AFFIDAVITS ARE NECESSARY.

BOYD AND ANOTHER v. DURAND, M. T. 1809, C. P. 2 Taunt, 161.

A rule nisi had been obtained to discharge the defendant out of custody on the following grounds. An affidavit to hold to bail had been filed with the filacer of Middlesex, and a *capias* had issued into that county. The defendant not being found there, a *testatum capias* was not sued out; but an original *capias* directed to the sheriff of Surrey; but the plaintiff had omitted to file with the filacer of the latter county an office copy of the affidavit.

Per Cur. The act 12 Geo. 4, c. 29, § 2, does not require that more than one affidavit of debt shall be made. The practice has prevailed of sending a copy of the filacer of another county, who thereupon makes out a *capias*, but the deputy filacer for both counties happening in this case to be the same, no injury or injustice can accrue from the fact of his reading two affidavits in the character of filacer for Middlesex, rather than in the character of filacer for Surrey. Rule discharged.

A second affidavit to hold to bail is unnecessary where plaintiff proceeds by a second original *capias* instead of a *testatum capias*. Qu. Whether it is necessary to file an office copy of the affidavit with the filacer of the second county. The Court will not, however, on such grounds discharge a defendant from arrest. An affidavit for goods sold

III. AFFIDAVITS IN PARTICULAR ACTIONS.

1. *IN FORM, EX-CONTRACTU.*

(A) IN ASSUMPSIT.

(a) *Personal property, goods sold, let to hire, &c.*

1. JENKINS v. LAW, H. T. 1790, C. P. 1 B. & P. 365.

Per Eyre, C. J. If a plaintiff swears that a defendant is indebted to him for "goods sold and delivered," it is enough, and he need not set out so much of the transaction as will show that it amounted to a sale, for he takes upon himself to say, that such a sale and delivery took place as constitute a valid cause of action.

need not set out so much of the transaction as shows that it amounted to a legal sale.

2. PERKS v. SEVERN, H. T. 1806, K. B. 7 East, 194, S. C. 3 Smith, 339.

On a rule to show cause why the defendant, on filing common bail, should not be discharged out of custody, it appeared that he had been arrested on an affidavit "for goods sold and delivered," without stating "by whom, to whom, or for whose use." In support of the rule, the case of Mackenzie v. Mackenzie, 1 T. R. 717, was relied on. The Court concurring in the judgment given in that case, made the rule absolute. See Bradshaw v. Saddington, 7 East, 94.

3. CATHROW v. HAGGER, M. T. 1806, K. B. 8 East, 106. S. P. TAYLOR v.

FORBES, T. T. 1808, K. B. 11 East, 315, FENTON v. ELLIS, E. T. 1815, [398] C. P. 6 Taunt. 192; 1 Marsh, 535, S. C.

On an affidavit of debt, only alleging "that the defendant is indebted to the plaintiff for goods sold and delivered," (not stating by the plaintiff to him, the defendant,) a rule was obtained for the defendant's discharge, on filing common bail; and the court considering the objection fatal, made the rule absolute.

But an affidavit "for goods sold and delivered," without stating "by whom, to whom or for whose use," is not tenable. Or not stating by the plaintiff to him, the defendant;

4. YOUNG v. GATIEN, E. T. 1814, K. B. 2 M. & S. 603.

The affidavit stated, "that the defendant was justly and truly indebted to the plaintiff in, &c. for the work and labour of the plaintiff, and for materials found by the plaintiff, and used and applied therein, and also for goods sold, and money paid by the plaintiff, at the request of the defendant." It was suggested that it did not appear from the affidavit whether the goods had been delivered to the defendant or to a third person. The Court concurred in this opinion, and made a rule absolute for discharging the defendant on filing common bail.

Or without saying to the defendant; It ant;

4. BELL v. THRUP, E. T. 1719, K. B. 2 B. & A. 596, S. C. 1 Chit. Rep. 331.

On a rule to show cause why the defendant, on filing common bail, should not be discharged out of custody, on the ground of a defect in the affidavit, which stated that the defendant is indebted to the plaintiff for goods sold by plaintiff "for defendant," instead of "to defendant." *Per Cur.* It is a general rule that the deposition should be expressed in precise and positive language, and not left as matter of inference or argument; here the affidavit imports to be for goods sold and delivered for the defendant, instead of to him; which is

Or "for the defendant," instead of "to the defendant."

insufficient. We must decide according to the actual meaning of the words. Rule absolute. See *Cathrow v. Hagger*, 9 East, 106; *Taylor v. Forbes*, 11 East, 316; *Brown v. Garnier*, 6 Taunt. 389; *Fenton v. Ellis*, 6 Taunt. 192; *Perks v. Severn*, 7 East, 194; *Young v. Gatién*, 2 M. & S. 603.

6. *HOPKINS v. VAUGHAN*, E. T. 1810, K. B. 12 East, 398; *S. P. LASCAR v. MORIOSEPH*, M. T. 1823, C. P. 1 Bing. 367.

Or 'for goods bargained and sold,' without alleging 'they were delivered.' [399]

A rule was obtained to show cause why the defendant should not be discharged out of custody on filing common bail, on the ground that the affidavit stated "that the defendant is indebted to the plaintiff for goods bargained and sold," without adding "that they were delivered to the defendant."

Per Cur. There is a great difference between holding a party to bail for goods sold and delivered, and that of goods bargained and sold. In the former, the creditor having actually parted with the possession of his property, is clearly entitled to his price; in the latter instance, he absolutely retains the goods, and is merely entitled to recover the difference between the value of the goods and the price agreed on, consequently, if we were to discharge this rule it would be unjust, as it is unreasonable to say, that a creditor who has his goods in his possession as a security, should likewise have the body of his debtor under arrest.—Rule absolute. See *Slade's case*, 4 Rep. 93-4-5; *Knight v. Hopper*, Skin, 647; *Dyer*, 30, a.

7. *COPE v. JOSEPH*, H. T. 1821, Exch. 9 Price, 155.

Semb. A defendant who has undertaken to pay for goods sold to a third person, in the event of the latter not paying for them, may be held to bail on the common affidavit.

A rule had been obtained to show cause why the bail bond should not be delivered up, and the defendant discharged on common bail. In support of the application it was stated that the defendant had been arrested on an affidavit of debt, wherein it was sworn that the defendant was indebted to the plaintiff in a named sum, upon and by virtue of a memorandum, whereby he undertook and agreed, that if the plaintiff would credit S. K. M. with goods to the value of 300*l.* the defendant would be answerable to the plaintiff for the same to that amount; and that the plaintiff did afterwards sell and deliver, &c. &c.

Per Cur. This case cannot be distinguished from the common one of a principal debtor; the nature of the defendant's undertaking, from its peculiar terms, creates a similar liability; the same evidence, or very little more, would support the present action. The person guaranteeing in this manner the payment of the debt about to be incurred by the purchaser of the goods became at least as much the debtor of the plaintiff, for the price of the property, as the purchaser himself, for any sum within the amount of his guarantee. To this extent he made himself directly responsible, and there can be no doubt but that an action of debt might be supported against him on this for that amount. Sed Vide 2 Camp. 215.

8. *BROWN v. GARNIER*, M. T. 1815, C. P. 2 Marsh, 83; 6 Taunt. 389; S. C.

A motion was made for delivering up the bail bond on this action, on the ground of the affidavit being defective. It stated the defendant to be indebted to the plaintiff for hire of divers carriages of the plaintiff, to and for the use of the defendant, without showing that they were hired of the plaintiff, or by whom they were hired.

Per Cur. The words, "hired to the defendant," imply a contract, and are equivalent to saying, "let to hire to the defendant," and although "hired to the defendant" is not strictly a proper or grammatical expression, it is not so unusual as to warrant the rejection of the affidavit.

(b) *Personal Services.*

1. *YOUNG v. GATIEN*, E. T. 1814, K. B. 2 M. & S. 603.

The affidavit must allege that the remuneration is due from the defendant to the plaintiff.

A statement in an affidavit of debt, "that the defendant, master or commander of the ship *Olive*, is justly and truly indebted to the plaintiff for the work and labour of the plaintiff, and his workmen and servants, done and performed in and on board the said ship, and for materials found and provided by the plaintiff, at the special instance and request of the defendant," was contended to be insufficient, and a rule nisi obtained to discharge the defendant out of custody, on filing common bail, on the ground that it did not state "for the defendant," or that the goods were sold "to the defendant."

Per Cur. Although the cause of action stated in the affidavit is work done on board the ship, it does not result as a necessary consequence from those premises, that the defendant is indebted as captain, he being only liable upon his express contract; and from the language of the affidavit, the inference that the work, &c. may not have been done for a third person is not repelled.—Rule absolute.

2. *SYMONDS v. ANDREWS*, M. T. 1814, C. P. 5 Taunt. 751; 1 Marsh. 317, S. C. In this case a motion was made to discharge the defendant on entering a common appearance, on the ground of the affidavit being defective, it alleged "that the defendant was indebted to the deponent for money paid, laid out, and expended, and wages due to him, this deponent, for his services on board the defendant's ship." The objection raised was, that the affidavit did not state the debt to be due from the defendant. *Per Cur.* The allegation in the affidavit, "for services on board the defendant's ship," is material; as he is charged as owner, the wages were clearly due from him.—Application refused. See 1 T. R. 717; 7 East, 194; 8 id. 106; 3 id. 110; 3 id. 315.

3. *BLISS v. ATKINS*, C. P. 1 Marsh. 217, n. a; 5 Taunt. 756: S. C.; *BROWN v. GAMNIER*, 6 Taunt. 389; S. C. 2 Marsh. 83.

The affidavit to hold to bail in this case was "for work and labour, as the defendant's servant," without stating "at the request of the defendant, or on his retainer." A motion was made that the bail bond should be delivered up to be cancelled.—Rule refused.

4. *DURNFORD v. MESSITER*, M. T. 1816, K. B. 5 M. & S. 446.

On an affidavit of debt for goods sold, work, and labour, &c. omitting to state "at the special instance and request of the defendant;" a rule was obtained to show cause why the defendant, on filing common bail, should not be discharged. *Per Cur.* An affidavit to hold a party to bail must be explicit and unequivocal. The present deposition is insufficient, for an inference may be drawn that the goods were sold to a third person, without the defendant's permission, in which case he would not be liable. Rule absolute. See *Erye v. Hulton*, 5 Taunt. 704; *Bliss v. Atkins*, 5 Taunt. 756, *contra*.

(c) *Money lent.*

JACKS v. PEMBERTON, E. T. 1794, K. B. 5 T. R. 552.

The affidavit was, that the defendant was justly and truly indebted to the plaintiff for money actually advanced by plaintiff to defendant for the use of A. B. and for which money the defendant promised to be accountable, and to repay or cause to be repaid or secured to plaintiff in three days from the day of plaintiff's so advancing and lending the same. *Per Cur.* the affidavit is defective; it should have alleged that the money had not been secured according to the agreement. The deponent swears not only to the existence of the debt but also to a conclusion of law, and afterwards discloses promises which do not support that deduction.

(d) *Money paid.*

HULTON v. EYRE, M. T. 1814, C. P. 1 Marsh. 315: S. C. by the name of *Eyre v. Hulton*, 5 Taunt. 704. S. P. *BERRY v. FERNANDES*, T. T. 1823, C. P. 1 Bing. 338. *JONES v. EVANS*, M. T. 1823, K. B. cited in *Petersdorff on Bail*, 156, n. i.

The defendant was held to bail upon an affidavit stating the defendant to be indebted to the plaintiff, "for money paid, laid out, and expended by the plaintiff to and for the use of the defendant," without adding "at his request." A motion was made upon that ground for a rule to shew cause why the defendant should not be discharged out of custody. *Per Cur.* It would be very inconvenient to require the same precision in an affidavit to hold to bail as in a declaration; and although the allegation "at his request," would be necessary in the latter, it would be impossible to exact it in the former, as the plaintiff may have been obliged to disburse the money to satisfy some legal ability he may have incurred for the defendant. Thus, where the plaintiff is surety, he may

But stating "that defendant is indebted to plaintiff for money paid &c. and wages due to plaintiff for services on board the ship," is sufficient without an express averment that the debt was due from the defendant.

Semb. In the C. P. an affidavit for work and labour need not aver that the acts of service were performed at the request of the defendant; But in the K. B. this allegation is essential.

[401] An affidavit stating that money was lent by the plaintiff to the defendant for the use of another, and which the defendant promised to repay or cause to be repaid or secured to the plaintiff is defective

It is not necessary in an affidavit to hold to bail for money paid to the use of the defendant, to state that it was at the re

quest of the be compelled to pay the money even against the express interdiction of his defendant. principal.—Rule refused.

[402]

See *Bliss v. Atkins*, 1 Marsh, 317, n. a; as to the request necessary to support an action for money paid, see *Exall v. Partridge*, 8 T. R. 308; *Child v. Morley*, 8 T. R. 610; *Capp v. Topham*, 6 East, 392; *S. C. 2 Smith*, 443; *Moore v. Pyrhe*, 11 East, 52; *Durnford v. Messiter*, 5 M. & S. 446; and post, tit. Money paid.

The affida-
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allege that
the money
was had
and receiv-
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defendant.

Semb. That
it is necessa-
ry to allege
a request.
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of depo-
nent, and
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has not ac-
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davit sta-
ting that the
defendant is
indebted to
the plaintiff,
"as secretary
to the Tontine
Society, for
money had
and received
to his use."

(c) *Money had and received.*

1. *COPPINGER v. BEATON*, M. T. 1799, K. B. 8 T. R. 338; *S. P. SYMONDS v. ANDREWS*, 5 Taunt, 703; *S. C. 1 Marsh*, 315, by the name of *Hulton v. Eyre*.

The affidavit stated "the defendant to be indebted to the plaintiff for money had and received," on account of this deponent, as the owner of a ship or vessel called the *Guardian*. *Per Cur.* The affidavit is sufficient it could not be said that the defendant is indebted to the plaintiff, unless the money had been actually received by him.

2. *CARNICHAEL v. DAVIS*, H. T. 1823, K. B. MS.; cited *Peter. on Bail*, 157, n. 1.

The affidavit stated that the defendant was indebted to the plaintiff in a certain sum "for money had and received to his use;" but it omitted to allege that the defendant had requested a plaintiff. In support of the motion for leave to enter an exoneratur on the bail piece, the case of *Durnford v. Messiter*, 5 M. & S. 446, abridged, ante, p. 400, was relied on. *Per Bayley, J.* It is essential that a request should be stated.—Rule to show cause granted. See *Petersdorff on Bail*, 157.

3. *CHAMPION v. GILBERT*, T. T. 1694, K. B. 4 Burr, 2127.

The affidavit alleged "that the defendant was justly and truly indebted to the deponent in the sum of 5000*l.* for so much money had and received of the plaintiff, and for which he has not accounted." *Per Cur.* The last words render the affidavit not positive; the defendant must be discharged on commop bail.

4. *WHITCHURCH v. WHITING*, M. T. 1796, Ex. 3 Anstr. 797.

An affidavit alleged that the defendant was indebted to the plaintiff "as secretary to the Tontine Society," for money had and received to his use.

Per Cur. It is invalid; it ought to have distinctly stated the character in which the plaintiff sues.

Per Cur. It is invalid; it ought to have distinctly stated the character in which the plaintiff sues.

(f) *Interest.*

BROOK v. TRIST, M. T. 1808, K. B. 10 East, 358.

The affidavit on which the defendant had been holden to bail stated "that the defendant is indebted to the plaintiff in a certain sum for interest money, under an agreement." A rule was obtained for the defendant's discharge on common bail; and *Per Cur.* Where the claim for interest is derived from a special contract, the particular nature and terms of the agreement must be specifically described, otherwise the defendant is entitled to be discharged from custody. See *Jenkins v. Law*, 1 B. & P. 365.

(g) *Account stated.*

1. *HATFIELD v. LINGUARD*, H. T. 1795, 6 T. R. 217.

The affidavit stated, that the defendant was justly and truly indebted to the plaintiff, in 472*l.* and upwards, under and by virtue of a certain agreement in writing, dated, &c. entered into between the deponent (the plaintiff) and the defendant; whereby the defendant undertook and engaged, that he, together with A. and B. should pay or discharge, on or before, &c. the balance of all subsisting accounts between them, which said balance is still due and unpaid to this deponent. This was held to be inaccurate and defective, for the purpose of holding the defendant to bail; the plaintiff should have shown what the balance was, and have sworn that that was still due and unpaid; whereas the affidavit went to the whole sum mentioned in the agree-

An affidavit
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bail for in-
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greement,
must state
the nature
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the suit is

ment, which was inserted as a penalty for securing the balance; and a defendant cannot be held to bail for a penalty, but only for the sum secured by the stipulated forfeiture.—Rule absolute for defendant's discharge.

2. *ERCKE v. EVANS*, H. T. 1820, K. B. 2 Chit. Rep. 15.

This was an application for a rule to set aside the proceedings on the ground that the affidavit on which the defendant had been holden to bail was insufficient. It alleged "that the defendant is indebted to the plaintiff in 1500*l.* for money laid out and expended by the deponent for the said defendant, and upon the balance of accounts." *Per Cur.* The affidavit cannot be sustained; it does not specify how much is due upon the balance of accounts, or of what the balance consists, or whether it has been liquidated by the defendant. Rule absolute.

3. *JONES v. EVANS*, H. T. 1823, K. B. cited in *Petersdorff on Bail*, 158. n. s.

The question raised on this application for the defendant's discharge was, whether in an action for money paid the affidavit should state a request. The Court said, that in the other cases respecting money, such as money had and received, and on account stated, it is necessary to swear to a request. *Holroyd, J.* in the same term, granted a rule nisi, because the affidavit on an account stated had not a request.

(h) *On special contracts.*

1. *MACPHERSON v. LOVIE*, M. T. 1822, K. B. 1 B. & C. 108; S. C. 1 D. & R. 69.

On a rule to show cause why the bail bond given in this cause, should not be given up to be cancelled, and that the defendant should be at liberty to file a common bail. It appeared that the affidavit of debt stated, that the cause of action arose on an agreement, by which the defendant promised, that on his return to England, he would, in the month of March or April last, marry the plaintiff, or pay her 1000*l.*; and then it was sworn that, although the defendant was returned, and the months of March and April were past, yet he had not married the plaintiff, although often requested so to do, nor had he paid to the plaintiff 1000*l.*; but the same remained wholly due and unsatisfied. In support of the rule it was contended that there was no consideration stated on the part of the plaintiff, for she did not promise to marry the defendant; there was no mutuality in the engagement; and the cases of *Taylor v. Forbes*, 11 East, Rep. 315; *Durnford v. Messiter*, 5 M. & S. 446. *Fenton v. Ellis*, 6 Taunt. 192. were relied on. *Per Cur.* Unless it appears to us that the affidavit discloses a consideration for the promise it is bad. In this agreement the lady does not undertake to marry the defendant. There is no consideration on her part; how with decency could she tender herself, and request him to marry, so to afford evidence of a demand and a refusal; it would be impossible, as appears from the affidavit, to frame a declaration on such a contract; and we cannot, therefore, permit the defendant to suffer from an arrest.—Rule absolute. Hence an affidavit on contract to secure or repay money must aver that it has not been paid or secured.

2. *JACKS v. PEMBERTON*, E. T. 1704, K. B. 5 T. R. 552.

Affidavit "that the defendants were indebted to the plaintiff in a certain sum for money lent by the plaintiff to the defendant, for the use of another, and for which the defendant promised to be accountable, and to repay, or cause to be paid, or secured to the plaintiff. *Per Cur.* Swearing positively to a debt is not sufficient without showing the nature of that debt and its non-payment. Here it is not known that the money advanced by the plaintiff has not been secured according to the contract.—Rule absolute.

3. *WILDEY v. THORNTON*, T. T. 1802, K. B. 2 East, 409.

This affidavit of debt stated that the defendant "is indebted to the plaintiff in the sum of 50*l.* under a certain agreement in writing, dated, &c. between the plaintiff and the defendant, by which the defendant agreed to forfeit the

seizure is not a penalty.

[405]

Where a person binds himself in a penalty of 100*l.* for perform-

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cannot be

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An affidavit

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sum which

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a breach of

the condi-

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ficient.

An affidavit

to hold to

bail in an

action for

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cupation

need not

state that

the defend-

ant is the

tenant in

possession.

[406]

The instru-

ment must

not only be

described

in terms,

but must be

stated ac-

cording to

its legal

effect.

sum of 50*l.* without specify in what manner the contract was infringed, or rendering it possible to say whether it was in the nature of a penalty or stipulated damages. On a rule to show cause why the defendant should not be discharged on filing bail. *Per Cur.* This affidavit is totally untenable; for it neither alleges whether the 50*l.* be stipulated damages or a penalty, nor does it disclose the nature of the contract, or a breach; the rule must consequently be made absolute. See *Anon.* Salk. 100; *Whitfield v. Whitfield*, Barnea, 109; *Archer v. Ellard*, Sayer. 109; *Brookes v. Friend*, cited *Stintor v. Hughes*, 6 T. R. 13; *Hatfield v. Linguard*, 6 T. R. 217.

4. *EDWARDS v. WILLIAMS*, M. T. 1813, C. P. 5 Taunt. 247.

The defendant had bound himself in a penalty of 100*l.* for performance of repairs within a certain period, and had been arrested on an affidavit that the defendant was indebted to the plaintiff in the sum of 100*l.* on that agreement (which had been set out in a previous part of the affidavit) in that behalf mentioned, for and by reason of his neglect in repairing. A rule nisi had been obtained to cancel the bail bond, on the ground that the affidavit did not show in what respect and to what amount he had failed in the fulfilment of his contract, and that it did not appear on the face of the deposition to be a case of stipulated damages. *Per Cur.* Bail can only be required for the amount of the damages actually sustained by a breach of the contract; and as the defendant has been arrested for the penalty, he is entitled to be discharged on entering a common appearance.—Rule absolute. See 2 B. & P. 346; Sid. 63; 1 Salk. 100; 1 Lev. 260; Noy. 88; 2 Roll. Rep. 53; 10 East, 358; Doug. 467.

5. *SKEEN v. M'GREGOR*, E. T. 1823, C. P. 1 Bing. 242.

A motion was made to show cause why the bail in this case should not be discharged, on the ground of the insufficiency of the affidavit on which the defendant had been arrested. The affidavit stated, that the defendant was justly indebted unto the plaintiff in the sum of 499*l.* 10*s.* upon and by virtue of a certain charter party of affreightment, bearing date the 15th January last, for and on account of the hire of a certain ship or vessel called the *Skeen*, let to hire by the plaintiff to the defendant, and by him taken for a certain voyage from the port of Leith to Poyais; it was submitted, that, by analogy to the cases where, in cases of action arising on the breach of a contract, it was holden that a breach should be shown in the affidavit to hold to bail; the affidavit should have contained an allegation of the breach of the condition contained in the charter party on the part of the defendant; but, the Court were of opinion that the affidavit was sufficiently explicit, and refused the rule.

6. *LEE v. SELWOOD*, E. T. 1821, Exchequer, 6 Price. 322.

To an affidavit to hold to bail in an action for use and occupation an objection was taken that it was invalid, as the debt was not in its nature capable of being stated with a certainty, and that the defendant was not described as tenant of the premises to the plaintiff. *Per Cur.* We are of opinion that the debt and premises as alleged are sufficiently positive and explicit; and as the statement would be sufficient in a declaration, the rule must be discharged.

(i) *Bills of exchange and promissory notes; description of the instrument and plaintiff's interest.*

1. *WILKES v. ADCOCK*, M. T. 1798, K. B. 8 T. R. 27. S. P. *ELSTONE v. MORTLAKE*, M. T. 1819, K. B. 1 Chit. Rep. 648.

The affidavit described the instrument upon which the action was brought as "a bill of exchange or order for, &c. drawn by A. upon and accepted by the defendant payable to the plaintiff." The declaration stated, that D. H. on, &c. according to the custom of merchants, made his bill of exchange in writing directed to the defendant, requiring him to pay to the plaintiff, or order, the sum of, &c. out of the monies which he (the defendant) might receive of A. B. American agent, when received with lawful interest. The Court considered this variance fatal, and ordered the bail bond to be delivered up.

2. *BRADSHAW v. SADDINGTON*, M. T. 1806, K. B. 7 East, 94; S. C. 3 Smith, 117.

A rule was obtained to show cause why the defendant should not be discharged out of custody on the ground that the affidavit on which he had been

held to bail did not show in what character he sued, it stated that "defendant is indebted upon and by virtue of a certain bill of exchange, drawn by the defendant, and long since due and unpaid." *Per Cur.* We are of opinion that this rule must be discharged; it being unnecessary for the plaintiff to show in what particular capacity he sues, whether as holder or indorsee; for if he makes an affidavit on an instrument to which he has no legal right, he is liable, either to an indictment for perjury, or to an action for a malicious arrest.—Rule discharged. See *Coppinger v. Beaton*, 8 T. R. 338.

3. *BALBY v. BATLEY*, 1 Marsh. 424; 6 Taunt. 25. S. C.

A motion was made to enter a common appearance, and a rule nisi obtained. The affidavit to hold to bail merely stated the defendant to be indebted to the plaintiff on certain promissory notes of the said defendant, without alleging that they were payable to the plaintiff, or that they were payable to some other person, and had been indorsed to the plaintiff. *Per Cur.* We are unanimously of opinion that the affidavit is defective. Rule absolute. See *vide* 7 Taunt. 171; 2 B. & B. 338. where it is observed that the case of *Bradshaw v. Saddington*, 7 East, 94, was not cited when *Balby v. Batley* was determined.

4. *MACHU v. FRASER*, M. T. 1816. C. P. 7 Taunt, 171; 2 Marsh. 483; S. C.

In this case the defendant had been arrested upon an affidavit that the defendant was indebted to the plaintiff upon the two following bills of exchange; viz. one for the sum of —l. drawn by the defendant upon, and accepted by J. C.; and the other for —l. drawn by the plaintiff upon, and accepted by the defendant. A rule to show cause why the bail bond should not be cancelled on account of the affidavit being defective had been granted, as the affidavit neither disclosed the plaintiff's character with reference to the bills of exchange, nor stated their dates, and they had become due and unpaid. *Per Cur.* The first objection, that the plaintiff's interest in the bill was not described, is untenable. But on the ground of the second objection, this rule must be made absolute. The Court would not in this case allow a supplemental affidavit.—Rule absolute. See 7 East, 94; 1 N. R. 424; 2 M. & S. 148; 1 N. R. 157.

upon and accepted by defendant, without stating their dates, or that they were due and unpaid is defective. *Sed sem.* that such an affidavit need not disclose in what character the plaintiff stands.

5. *WARNLEY v. MACEY*, M. T. 1820, C. P. 2 B. & B. 338; S. C. 5 Moore,

52. *LAMB v. NEWCOMBE*, M. T. 1820, 2 B. & B. 343, S. C. 5 Moore, 14.

A rule was obtained to show cause why the defendant should not be discharged out of custody, on entering a common appearance, on the ground that the affidavit on which he had been holden to bail was insufficient, as it only stated, "that the defendant was indebted to the plaintiff, as acceptor of a bill of exchange drawn by the plaintiff, and due at a day then past; without showing the relative situation of the plaintiff and defendant, or adding that the bill remained unpaid. *Per Cur.* It is a general and unqualified rule, that the affidavit to hold to bail must show the relation between the parties, that is, in what capacity the defendant is a party to the instrument; now it appears to us to have been sufficiently stated in the present case, viz. that the defendant is indebted as the acceptor of a bill drawn on him by the plaintiff, therefore the first objection is disposed of. 2d. We have to consider whether it clearly appears from the affidavit that the bill still remains unpaid; now in order to show that there are no particular words necessary, any statement showing that the bill is due, is equivalent to stating that it still remains unpaid. Here it is expressly and unequivocally stated, that the bill was due at a day past, and that the defendant, as acceptor, was indebted to the plaintiff as drawer thereof; we are consequently of opinion that the affidavit is sufficiently explicit in alleging that the bill remains unpaid. For if it had been paid, the allegation that the defendant was indebted to the plaintiff, would have been altogether false, and the party deposing would have subjected himself to an indictment for perjury. If we are to hold this affidavit insufficient, we should be deciding contrary to principle, sense, and reason; and it is

Although an affidavit of debt on a bill of exchange does not state in what character the plaintiff sues it is sufficient. But *semb.* an affidavit on a promissory note is defective, unless it state how the plaintiff became entitled to recover. An affidavit of debt stating that the defendant is indebted to plaintiff on a bill drawn by the defendant, accepted upon and drawn by J. T. and another drawn by plaintiff [407] An affidavit to hold to bail, stating "that the defendant is indebted to the plaintiff as acceptor of a bill drawn by the plaintiff and due at a day then past," is sufficiently explicit, without further showing the relation between the plaintiff and defendant, or adding "that the bill remained unpaid."

clear, beyond all doubt, that this affidavit is sufficiently positive and certain.—Rule discharged. See *Balby v. Batley*, 6 Taunt 25; S. C. 5 Marsh. 424; *Machu v. Fraser*, 7 Taunt. 171; S. C. 2 Marsh. 483; *Davidson v. March*, 1 N. R. 157; *Coppinger v. Featon*, 8 T. R. 338; *Taylor v. Forbes*, 11 East, 315; *Perks v. Severn*, 7 East, 194; *Bradshaw v. Saddington*, 7 East, 94; *Sands v. Graham*, 4 Moore, 18; *Edwards v. Dick*, 3 B. & A. 495; *Elstone v. Mortlake*, 1 Chit. Rep. 648; *Humphries v. Williams*, 2 Marsh. 231; S. C. 6 Taunt. 531; *Jackson v. Yate*, M. & S. 148.

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(j) *How defendant became a party to.*

1. HUMPHRIES v. WINSLOW, E. T. 1816, C. P. 6 Taunt. 531; 2 Marsh. 231. S. C. A rule was obtained to show cause why the bail bond in this case should not be cancelled, as the affidavit to hold to bail alleged that the defendant was indebted to the plaintiff in the sum of 95*l.* as the indorsee of a certain bill of exchange drawn by one T. W. without stating how the defendant became liable, whether as acceptor or indorser. *Per Cur.* The rule must be made absolute. There is, however, a distinction between stating the plaintiff's title to the bill or note, and the defendant's liability. Although it may not be absolutely essential to state the former, the latter must be clearly, distinctly, and appropriately described.—Rule absolute.

2. NOTE IN MACHU v. FRASER, M. T. 1816, C. P. 7 Taunt. 172. *Per Cur.* According to the language of the common and ordinary forms, the term indorsee is descriptive of the relation of the plaintiff to the bill, and not of the relation of the defendant.

(k) *That the bill is due.*

1. HOLCOMBE v. LAMBUKIN, E. T. 1814, K. B. 2 M. & S. 475. The affidavit was against the acceptor of a bill of exchange drawn by the deponent; but it was not shown that the bill was due. The Court made a rule absolute for the defendant's discharge on common bail. See *Jackson v. Yate*, 2 M. & S. 148; *Machu v. Fraser*, 7 Taunt. 171; *Sands v. Graham*, 4 B. Moore, 18; *Warmsley v. Macey*, 2 B. Moore, 53; S. C. 3 B. & B. 338; *Lamb v. Newcombe*, 5 B. Moore, 14; 2 B. & B. 343; *Brooke v. Clarke*, 2 D. & R. 148.

2. EDWARDS v. DICK, E. T. 1820, K. B. 3 B. & A. 495.

A rule was obtained to show cause why the defendant, on filing common bail, should not be discharged, as the affidavit of debt merely stated, "that the defendant, the drawer of the bill, is indebted to the plaintiff in a certain sum," without stating that the bill is due and unpaid. On showing cause, the case of *Davidson v. March* was relied on as an express authority; it being determined there that the affidavit need not state that the bill is due, since that is implied in the word indebted; but *Per Cur.* In order to enable us to lay down a general rule, which we now intend to do, it will be compulsory in us to overrule the case of *Davidson v. March*; and we are consequently of opinion that this affidavit is not tenable, as it does not allege that the bill is due.—Rule absolute.

3. DAVIDSON v. MARCH, H. T. 1805, C. P. 1 N. R. 157; S. P. JACKSON v. YATE, M. T. 1813, K. B. 3 M. & S. 148.

An affidavit to hold to bail was objected to, on the ground that it stated the defendant to be indebted as endorsee of a bill of exchange, without showing that the bill was due. *Per Cur.* The affidavit is sufficient; as the defendant being described as an indorser, and as such only, a collateral security could not be indebted, unless the bill had become due, and been dishonoured. See 2 M. & S. 149; id. 475; 2 D. & R. 148.

4. ELSTONE v. MORTLAKE, M. T. 1819, K. B. 1 Chit. Rep. 648.

This was an application to set aside the bail bond given in this case, on the ground that the affidavit on which the defendant had been holden to bail was defective. The action, it appeared, was brought upon a bill of exchange, payable to a third person; the affidavit stated, "that the bill was payable at H. & Co. at a certain day now past." In support of the motion, it was sh-

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jected that it should have been stated in terms in the deposition what the day was; but the objection was overruled by Best, J. who observed, that the affidavit was good; it being averred that it was due at a day now past, which is sufficiently explicit.—Rule refused.

(1) *Description of defendant's christian name.*

1. *HOWELL v. COLEMAN*, T. T. 1801, C. P. 2 B. & P. 466.

The defendant had only subscribed the initials of his christian name to a bill of exchange, and all possible inquiries had been made to ascertain it without effect. He was ultimately arrested by the initials, and the Court held the affidavit and proceedings regular, and refused to discharge him on entering common appearance.

2. *REYNOLDS v. HANKIN*, M. T. 1821, 4 B. & A. 386; *S. P. PARKER v. BENT*, E. T. 1822, K. B. 2 D. & R. 73.

The defendant had been arrested by the plaintiff on a bill of exchange signed by the defendant with the initials of his christian name. It was positively sworn that every exertion, though ineffectual, had been made to ascertain the defendant's real name prior to the arrest. The Court, after taking time to consider, were of opinion, that it was not sufficient to describe a person by the initials of his christian name only, and made the rule for the defendant's discharge absolute. See *Tomlin v. Preston*, 1 Chit. Rep. 397.

3. *M'BEATH v. CHATTERLEY*, M. T. 1822, K. B. 2 D. & R. 237.

On motion to set aside proceedings, it appeared, that the defendant, during the life-time of her husband, as is usual, adopted his christian name, and subsequent to his death, she had accepted a bill by those initials, and had been by them arrested. *Per Cur.* Whether the initials be or be not the correct ones, the arrest is equally irregular, for in either case the name should have been ascertained. We cannot, however, set aside the whole of the proceeding, but we will direct that the bail bond be delivered up to be cancelled, upon the defendant filing common bail; but without costs.

Formerly an affidavit and *capias* against the defendant by the initials of his christian name only was esteemed regular. But this doctrine is now overruled, and the defendant if arrested by his initials will be discharged out of custody. [410]

(B) IN COVENANT.

(a) *Stating the particulars of the deed.*

The affidavit to hold to bail in an action of covenant should set out in precise and unambiguous terms, the date of the deed, the names of the contracting parties, the substance of the particular covenant, and that the money therein specified to be paid is due.

(b) *Statement of the amount payable, and breach.*

SKEN v. M'GREGOR, E. T. 1823, C. P. 1 Bingham, 242.

On a rule to show cause why the bail in this cause should not be discharged, on the ground of the insufficiency of the affidavit, it appeared that it had alleged, "that the defendant was justly indebted unto the plaintiff in a named sum, upon and by virtue of a certain charter party of affreightment, bearing date the, &c. for and on account of the hire of a certain ship called the S. let by the plaintiff to the defendant, and by him taken for a certain voyage from L. to P." without containing any formal averment of a breach of the condition; but the Court considered that the defendant's non-performance of the covenant was sufficiently shown, and discharged the rule.

Hence where a lady after the death of her husband, continued to use the initials of her husband's name, and with them accepted a bill, the Court set aside the bail bond. An affidavit that the defendant is indebted to the plaintiff in a certain sum on a charter party, without alleging a formal breach is sufficient.

(C) IN DEBT.

(a) *On money bond.*

1. *HOBSON v. CAMPBELL*, T. T. 1788, C. P. 1 H. Bl. 245.

A bond had been given, conditioned for the payment of the bill of exchange drawn on A. residing in India, in case such bills should be returned to England protested for non-payment. The affidavit to hold the obligor to bail after stating "that he was indebted to the deponent in a certain sum," set out the condition of the bond, and then followed these words, "and that the said bills were not paid to his knowledge or belief in India or elsewhere, but, that they were protested for non-acceptance in India, and were still unpaid." The Court thought that, although the former part of this affidavit was sufficiently

An affidavit on a bond conditioned for the payment of money, on the happening of a particular event, does not show

ing that the positive, yet it became uncertain and defective, by being connected with the latter part, from which it did not appear that the bills had ever been protested for non-payment.

[411] Or stating generally "that the defendant is indebted in 6000*l.* upon a bond in the penal sum of 25,000*l.*"

2. *BOSANQUET v. FILLIS*, T. T. 1815, K. B. 4 M. & S. 330. A rule was obtained to show cause why the defendant should not on filing common bail, be discharged out of custody, on the ground that the debt sought to be recovered was not described as principal and interest in the affidavit to hold to bail, but that it only contained a general allegation, "that the defendant is indebted in 6000*l.* upon a bond in the penal sum of 25,000*l.* *Per Cur.* It is insufficient, for though using the term penal sum imports that the bond was subject to a condition, it might nevertheless be a condition for the performance of covenants, when it would be requisite to assign breaches, and show to what extent the plaintiff is damaged. Rule absolute. See *Hatfield v. Lingard*, 6 T. R. 217; *Willey v. Thornton*, 2 East, 409.

But an affidavit in debt on a bond, stating it to be for principal and interest due on a bond made by the defendant to the plaintiff, in a greater penal sum, is insufficient. An affidavit on an arbitration bond must set forth the condition of the bond."

3. *BYLAND v. KING*, H. T. 1817, C. P. 7 Taunt. 275; S. C. 1 Moore, 24. This affidavit to hold to bail stated that "defendant is indebted to plaintiff in the sum of 3000*l.* for principal and interest due on a bond in the penal sum of 6000*l.* On a rule to show cause why the former should not be discharged out of custody on entering a common appearance, an objection was taken to the affidavit, that it did not appear from the deposition that the bond was conditioned for the payment of money. *Per Cur.* To say that a bond for the payment of principal and interest is not a bond for the payment of money, would be incomprehensible, the objection is untenable. Rule discharged with costs. See *Bosanquet v. Fillis*, 4 M. & S. 330; *Willey v. Thornton*, 2 East, 409.

(b) *On a bond for the performance of an award*

1. *ARMSTRONG v. STRATTON*, E. T. 1817, C. P. 7 Taunt. 405; S. C. 1 Moore, 110. A rule was obtained to show cause why the defendant should not be discharged out of custody on entering a common appearance, as the affidavit on which he had been held to bail was defective, it merely stating that J. W. swears that defendant is indebted to this deponent, and to G. A. as assignees of J. W. a bankrupt, upon a certain bond, "conditioned for the performance of an award," omitting to set out the condition of the bond, or that any demand had been made. *Per Cur.* It is clear beyond all doubt that this affidavit is defective; it merely states that the defendant is indebted to the plaintiff on an arbitration bond, when in fact the condition should have been set out. But even if that had been disclosed, it would have been insufficient, for the deposition should have stated a demand on the defendant for payment of the money. Rule absolute. See *Long v. Linch*, 3 Wils. 154; S. C. 2 Bl. Rep. 740.

[412] Where the debt arises upon an Irish judgment, the affidavit to hold to bail must show the value of the money in English currency. The affidavit must describe the nature of the offence, and that a forfeiture has been incurred; but it is not necessary to state that the defendant is in

(c) *On judgments*

STORIE v. BALL, T. T. 1822, K. B. 2 Chit. Rep. 16.

On a rule to show cause why the defendant should not be discharged out of custody on filing common bail, it appeared that the affidavit on which he had been held to bail stated in substance that the defendant is indebted to the plaintiff in a certain sum by virtue of a judgment recovered in Ireland, omitting to show the value of the Irish money, which it was contended was a fatal defect. In this opinion Holroyd, J. acquiesced, and made the rule absolute.

(d) *On penal statutes.*

1. *DAVIS v. MAZZINGHI*, 1787, K. B. 1 T. R. 705; S. P. *WATSON v. SHAW*, M. T. 1788, K. B. 2 T. R. 654. The affidavit stated that the defendant had forfeited a specified sum by insuring in the lottery, without alleging that the defendant was indebted to the plaintiff, or that the debt was still due. *Per Cur.* The affidavit should specify the nature of the transgression, and that a forfeiture had been incurred; but a circumstantial description of the act which constitutes the alleged infraction of the law is unnecessary; nor is it requisite to state that the party

charged with having incurred the penalty is indebted to the plaintiff, or that such debt is still due. It would be unreasonable to compel the deponent to swear that it was a debt owing to him, when any other informer might have previously commenced an action against the defendant. Rule discharged.

2. *PRITCHETT, qui tam, v. CROSS*, H. T. 1792, C. P. 2 H. Bl. 17.

On a rule to show cause why the defendant should not be discharged on entering a common appearance, it appeared that he had been holden to bail for penalties incurred by insuring tickets in the lottery. The motion was made on the ground that the affidavit was untenable, as it stated the offence in the disjunctive, that she insured, or caused to be insured. *Per Cur.* There is no weight in the objection; the affidavit is sufficiently positive. Rule absolute.

3. *WATSON v. SHAW AND OTHERS*, M. T. 1788, K. B. 2 T. R. 654.

The affidavit to hold to bail alleged that the defendants, after the making of an act of parliament in the 27 Geo. 3, &c. entitled, &c. "An act for Licensing Lottery Offices," &c. and during the drawing of a lottery on, &c. did take and receive, &c. and in consideration thereof premised to pay, &c. on certain events relating to the drawing of tickets in the said lottery, and that the defendants had incurred penalties to the amount of 500*l.* The affidavit, it was argued, was insufficient, because the act of parliament was misrecited. *Per Cur.* The objection is fatal; for although it was not compulsory on the party to set forth the year in which the act passed, yet having undertaken to do so, the unnecessary matter cannot be rejected as surplusage. See *Cro. Car.* 232; *Dyer*, 203; *Salk*, 609; 1 T. R. 705.

4. *HOLLAND v. BOTHMAR*, E. T. 1791, K. B. 4 T. R. 228.

This was an action upon the lottery act, 22 Geo. 3, c. 47, to recover penalties for insuring tickets to different persons. The affidavit alleged that the defendant had promised and agreed to pay those several persons divers sums of money, on certain events and contingencies relating to the drawing certain tickets or numbers. &c. without adding, that the defendant had taken and received any money in consideration of such promises. A rule was obtained why the defendant should not be discharged out of custody. *Per Cur.* The words of the 13th section of the statute 22 G. 3, c. 47, being "whether with or without consideration," is a complete answer to the supposed defect. Rule discharged.

5. *REX v. DECKER*, H. T. 1796, Ex. 3 Arstr. 862.

This affidavit was on the lottery act, made by S. L. stating that the defendant, within six months before, received divers sums of money and in consideration thereof promised and agreed to repay certain other sums of money on certain events and contingencies relative and applicable to the drawing of certain tickets in and belonging to a certain lottery, authorized to be drawn in the kingdom of Ireland, by an act passed in the parliament of Ireland, contrary to the form of the statute, &c. The Court held the affidavit clearly sufficient. See 36 Geo. 3, c. 10; 27 Geo. 3, c. 1.

6. *R. KING v. COLE*, E. T. 1796, 6 T. R. 640.

The affidavit in this case was similar to the deposition in *Rex v. Decker*. It was objected, 1st, That it had only stated generally that the defendant had received divers sums, and in consideration thereof had promised to repay other sums, but had not stated the precise amounts, or from whom they were received or to whom the promise was made. 2d, That it was not shown that the plaintiff was authorized to bring the action pursuant to the 38th section of 27 Geo. 3, c. 1, which interdicts any action from being brought except in the name of his majesty's attorney general, or in the name of some officer appointed by the commissioners of the stamp duties. The Court intimated a strong opinion that there was no foundation for either of the objections; but made the rule absolute on other grounds.

7. *REX v. REBORD*, M. T. 1764, K. B. 3 Burr. 1569.

Action on 26 Geo. 2, c. 21, s. 3, for a forfeiture of 200*l.* for having sealed wrought silks found in his custody. For the defendant it was objected that it was not positively sworn in the plaintiff's affidavit that the defendant had committed the offence; it stated only "that he has cause of action

debted to the plaintiff or that such debt is still due.

On the lottery act saying that the defendant insured or caused to be insured—the use of the disjunctive will not vitiate. [413] It need not state the particular act; but if it does and misdescribes it, the variance is fatal.

On the lottery act, it need not be shown that the defendant received any consideration for his promises.

Nor is it essential to state from whom the sums were received. *Semb.* Saying generally that the defendant received di-

vers sums, and in consideration thereof promised to repay, would be sufficient by circumstantial; but the authority of the plaintiff to sue according to the 38th section of the act should be shown. [414]

On 26 G. 2. c. 21 for having sealed wronged silks, stating that plaintiff has cause of action against the defendant for 200*l.* forfeited by him for so much unsealed silk, &c. found in his custody." This is making the plaintiff a judge of the offence; it ought to be positive, "that the defendant had committed the offence described in the act of parliament." *Per Cur.* It is positive enough; he swears "that he had cause of action against him for 200*l.* forfeited by him," &c. the act does not require an affidavit at all.

8. *WHEELER v. COPELAND*, T. T. 1793, K. B. 5 T. R. 364. In an action for double rent, under the 2 Geo. 3, c. 19, s. 18, the affidavit stated a notice to quit, and that the defendant held over notwithstanding, "by reason of which, and by force of the statute, an action had accrued to the plaintiff to demand of the defendant double rent." *Per Cur.* The affidavit is argumentative, and does not state positively that the defendant is indebted to the plaintiff; it is merely to be collected by inference.

Affidavit for double rent must state positively that the defendant is indebted to the plaintiff & not merely that an action has accrued.

The affidavit to obtain a judge's order to hold to bail in actions *ex delicto* must state in intelligible language, the circumstances which gave rise to the subject of complaint, and damage resulting from it.

[415]
Formerly it was sufficient for an affidavit plaintiff of

But an affidavit is bad if it states that the defendant is indebted to the plaintiff in trover;

As it ought explicitly to disclose the cause of action.

An affidavit stating "that the defendant was indebted to the plaintiff in a certain sum, being the value of goods, (specifying them) delivered by the plaintiff on his account to the defendant, to be by him carried and delivered to J. W. for the use and on the account of the plaintiff," is sufficient; for although the term "indebted" is improperly used, yet it appears that the plaintiff has been injured to the amount sworn to, and also that he has an interest in the property, from its having been alleged that they were to be delivered for his use. *Per Cur.* In all these cases it is sufficient if the real facts be conveyed to the judge with sufficient distinctness to enable him, in the exercise of his discretion, to collect that the plaintiff has been damaged to a particular amount, though the affidavit might probably be framed in more formal, distinct, and specific terms. See *O'Mealy v. Newell*, 8 East, 364; *Molling v. Buckholtz*, 2 M. & S. 563.

(B) IN AN ACTION OF TROVER.*

1. *CHARTER v. JAKES*, H. T. 1777, K. B. Cowp. 529. *S. P. EMERSON v. HAWKINS*, M. T. 1762, C. P. 1 Wils. 335.

The plaintiff in his affidavit swore, "that the defendants had possessed themselves of divers goods belonging to plaintiff, and had refused to deliver them up, and that they or some of them had converted and disposed of them to his own use." It was insisted that the words "they or some of them" were not sufficiently precise, and that possession and refusal were only evidence of a conversion. But the Court overruled both the objections. In trover to state generally that the defendant had possessed himself of divers goods of the plaintiff of a certain value which he had converted to his own use.

2. *HUBBARD v. PACHECO*, E. T. 1789, C. P. 1 H. Bl. 218.

It was alleged that the defendant was indebted to the plaintiff in 23*l.* and upwards, in trover. On an objection being taken to the affidavit, the Court were clearly of opinion that it was not sufficiently explicit, and that a word so technical as trover ought not to have been inserted in the affidavit.—Rule absolute to discharge the defendant on common bail.

3. *WOOLLEY v. THOMAS*, E. T. 1798, K. B. 7 T. R. 550.

An affidavit to hold to bail in trover stated that the defendant had converted and disposed of divers goods of the plaintiff, of the value of 250*l.* which he refused to deliver, though the plaintiff had demanded the same, and that neither the defendant, nor any person on his behalf, had offered to pay to the plaintiff the 250*l.* or the value of the goods. *Per Cur.* This affidavit is insufficient, as it does not disclose in positive terms any legal cause

* By Reg. Gen. H. T. 48 Geo. 3 K. B. 9 East, 325; C. P. 1 Taunt. 203; Exch. 7 Price, 354; *Manning Ex. Pl.* 228; it is ordered "that no person shall be held to special bail in an action of trover, or detinue, without an order made for that purpose by the Lord Chief Justice, or one of the judges of the court."

of action against the defendant; for although it is alleged that the defendant refused to deliver up the property, it does not appear that the goods were ever in his possession.—Defendant discharged.

4. CLARKE v. CAWTHORNE, T. T. 1797, K. B. 7 T. R. 321.

The affidavit stated "the defendant has, or lately had, in his possession a certain bill of exchange of the plaintiff's, dated, &c. drawn by one W. M. up-
on, and accepted by, A. & M. for 65*l.* payable to the plaintiff, after one month's date, which bill the defendant, on demand, refused to deliver to the plaintiff, but on the contrary converted," &c. It was objected to the affidavit, and as-
sented to by the Court, that the affidavit was defective, as it did not show that the instrument remained due and unpaid. See *Mercer v. Jones*, 3 Camp, 477; *Atkins v. Wheeler*, 2 N. R. 205.

5. MOLLING AND OTHERS, ASSIGNEES OF WHITE AND OTHERS, v. BUCKHOLTZ, E. T. 1814, K. B. 2 M. & S. 563.

On a rule to show cause why the defendant should not be discharged out of custody, on the ground that the affidavit was defective. The deposition pur-
ported to have been made by the assignees of a bankrupt in trover for goods, "of which the defendant had possessed himself, and which he had re-
fused to deliver to the bankrupt before his bankruptcy, and to the assignees since, and had converted them to his own use, as appears by certain docu-
ments referred to, as this deponent believes." In support of the rule it was
contended that the allegation relative to the conversion was not positive or
verbal, but only inferential, and consequently insufficient to enable a judge to
grant an order. *Per Cur.* This affidavit is defective, as the facts are
vouched by reference only to documents and not supported by the substantive
belief of the party deposing.—Rule absolute. See *O'Mealy v. Newell*, 8
East, 364.

An affidavit for a bill of exchange must state its value, & that the instrument remains due and unpaid. [416]
An affidavit in trover to obtain an order a judge's or der must state the deponent's own substantive be- lief, and not a belief drawn from the inspection of books and documents.

IV. OF THE FORMAL PARTS.

(A) TITLE OF THE AFFIDAVIT.

(a) *With reference to the court.*

KENNET CARAL COMPANY v. JONES, M. T. 1797, K. B. 7 T. R. 451.

The affidavit of debt had been taken before a commissioner, but it did not state of what court he was commissioned, nor was it entitled. The Court considered neither of the objections tenable, and discharged the rule. *Vide ante*, p. 357.

It is not es- sential that the affida- vit should be entitled of the court.

(b) *With reference to the cause.*

1. HOLLIS v. BRANDON, E. T. 1797, C. P. 1 B. & P. 36. S. P. GREEN v. REDSHAW, E. T. 1798, C. P. id. 227.

The affidavit was entitled E. H. plaintiff, and W. B. defendant, and pro-
ceeded to state that W. B. the defendant in this cause, is justly and truly in-
debted to this deponent in the sum of, &c. It was contended that the depo-
sition was incorrectly entitled E. H. plaintiff, and W. B. defendant, when no
cause in fact existed. On the other side it was argued that the words plain-
tiff and defendant might be properly rejected as surplusage. Eyre, C. J. ob-
served, that he much doubted whether it was invalid; for since the statute,
authorising the suing out of bailable writs, it might be a question whether the
affidavit to hold to bail might not in fact be deemed the commencement of the
cause. Why is a writ considered as the first step in a cause before the parties
are in court? yet it always is so. The Court, after consideration, determined,
that as it was the settled practice of the Court of King's Bench, that an affi-
davit to hold to bail, entitled in a cause, should invariably be rejected, made
the rule absolute, in order to preserve an uniformity in the practice of the two
tribunals.

In the C.P. an affidavit entitled in the cause is irregular.

2. R. G. M. T. 1797, K. B. 7 T. R. 454.

Ordered, that affidavits of any cause of action before process sued out, to
hold defendant to bail, be not entitled in any cause, nor read if filed. For
authorities prior to the order, see *King v. Cole*, T. R. 640; *Clarke v. Caw-*

And in the K.B. it is ab- solutely in- terdicted by

* The same practice obtains in the Exchequer; *Manning's Prac.* 83.

rule of court. thorn, 7 T. R. 321; and as to inserting the name in general, vide ante, p. 358.

(B) OF DESCRIBING THE DEPONENT'S PLACE OF ABODE AND ADDITION.

(a) Of deponent's place of abode in the King's Bench.

1. REG. GEN. M. T. 1662, K. B.

Place of abode must be stated;

And it should be the actual bona fide place of residence of the party; but a person discharged from prison, who continues to sleep there at night by permission of the keeper, and has no other determined place of residence, may describe himself as "late of the prison."

Ordered, that the true place of abode and true addition of every person who shall make affidavit in court shall be inserted.

2. SEDLEY v. WHITE, M. T. 1809, K. B. 11 East, 528.

The deponent had described himself as "late in the Compter prison of Giltspur-street, in the city of London." It was afterwards shown that he had, before the making of the affidavit, been discharged from custody, and having no particular place of residence, had been, by the permission of the gaoler, suffered to lodge there at night. It was contended that the description being late of the place, rendered the affidavit invalid, and was, in fact, an evasion of the rule of court. But as the defendant had no fixed or permanent place of abode, and as he had so recently left the gaol and continued to sleep there, and no intention to mislead being manifested, the Court discharged the rule, observing, that in general, where a party has abandoned one place of abode, and resides at another at the time of making the affidavit, describing himself as late of the place at which he formerly resided, would be considered improper.

keeper, and has no other determined place of residence, may describe himself as "late of the prison."

3. HASLOPE v. THORNE; H. T. 1813, K. B. 1 M. & S. 163.

Or a party employed a greater part of the day at one place and sleeps at another, may be stated in the affidavit as resident of the former.

[418] Or when made by a clerk or a servant, his residence may be described to be the same as that of his employer; The addition of the deponent must be correctly stated;

A clerk, deposing in an affidavit of debt, described himself as of his principal's place of abode, when, in fact, he slept elsewhere; on this ground a rule was obtained to discharge the defendant on filing common bail. *Per Cur.* The proper construction to be put upon the words "place of abode," mentioned in the rule 15 Car. 2. is not to interpret them where the party deposing in general sleeps, but where he can be in general found; consequently this affidavit is sufficient, and the rule must be discharged.

4. ANON. M. T. 1814, K. B. 1 Chit. Rep. 464.; note semble S. C. ANON. 2 Chit. Rep. 15.

This affidavit to hold to bail was made by a clerk, who described himself as of his employer's place of abode, which on a rule to shew cause why the defendant should not be discharged out of custody on filing common bail, was contended to be insufficient. *Per Cur.* This deposition is well enough, the object of stating the residence being merely to know where the party deposing is to be found.—Rule refused. See the other cases collected, ante, p. 361.

(b) Of deponent's addition in the King's Bench.

1. SARRET v. DILLON, M. T. 1800, K. B. 1 East, 18. S. P. D'ARGENT v. VIVANT, K. B. 1 East, 330.

In this affidavit of debt, the plaintiff described himself as of a particular place without giving himself any addition, degree, or occupation. On a rule to show cause why the defendant should not be discharged out of custody on filing common bail. *Per Cur.* The rule of court, M. T. 15 Car. 2. is conclusive against this affidavit, for it expressly declares that "the true place of abode, and true addition of any person who shall make affidavit, shall be inserted in the affidavit." Has that rule been complied with? It has not; consequently the affidavit is defective, for want, of a proper addition.—Rule absolute.

2. HOLCOMBE v. LAMBEIN, E. T. 1814, K. B. 2 M. & S. 475.

But "gentle man of Chelsea," is insufficient;

A rule was obtained to show cause why the defendant should not be discharged out of custody on filing common bail, on the ground that the deponent had only described himself as "gentleman, of Chelsea," in the affidavit of debt, which was contended to be insufficient; but the Court thought the objection not tenable, and discharged the rule.

3. VASSIER v. ALDERSON, M. T. 1814, K. B. 3 M. & S. 165.

Or "of the city of Lon

This was an affidavit of debt made by a third person, in which he described

himself as "of the city of London, merchant," which, on rule to obtain his discharge on filing common bail, was contended not to be a proper addition within the rule 15 Car. 2 M. T. *Per Cur.* We can see no reason why an addition, which would be insufficient in an indictment, should not be good in an affidavit of debt; the words in the 1 Hen. 5, c. 5, being, "if the name of any town, hamlet, or place, and counties, is inserted in actions personal, &c. in which the defendant is conversant, shall be deemed a good addition," consequently we think the statute is satisfied in this case.—Rule refused. *Vide ante*, tit. Addition; and Petersdorff on Bail, 173. [419]

(c) *Of deponent's place of residence and addition in the Common Pleas.*

1. SMITH v. YOUNGER, M. T. 1803, C. P. 3 B. & P. 550.

A rule was obtained to show cause why the defendant should not be discharged on entering a common appearance, the deponent being described generally of Wapping, in the county of Middlesex, "manufacturer," but the objection was overruled.

2. POLLERI v. DE SOUZA, M. T. 1811, C. P. 4 Taunt. 154.

The affidavit purported to be made by J. M. clerk to J. M. of, &c. merchant. It was argued that it was defective, as the deponent's place of abode was not sworn to, and that the defendant ought consequently to be discharged on a common appearance being entered. The Court partly on this, and partly on the ground that it had not shown on what account the money was due, made the rule absolute.

3. ANONYMOUS, H. T. 1815.

No addition of the deponent had been inserted in the affidavit in this case. The Court was moved, on the authority of Jarret v. Dillon, 1 East, 18, ante, p. 418, to discharge the defendant; but they refused the rule, observing, that that decision was founded entirely upon the rule of M. T. 12 Car. 2, and that in the Court of Common Pleas there was no such regulation.

(d) *Statement that affidavit is made on oath.*

ANON. M. T. 1771, K. B. Lofft. 85.

An affidavit of debt in the following words, "A. maketh, that B. is indebted in a certain sum;" the jurat being regularly signed is sufficient, as the party is liable to be punished for perjury if untrue, notwithstanding the word "oath" is omitted.

(e) *Description of the defendant.*

REYNOLDS v. HANKIN, E. T. 1821, K. B. 4 B. & A. 536, S. P. TOMLIN v.

PRESTON, E. T. 1819, K. B. 1 Chit. Rep. 397, M'BEATH v. CHATTERLEY.

M. T. 1822, K. B. 2 D. & R. 237; PARKER v. BENT, M. T. 1822, 2 D. & R. 73.

The affidavit and *testalem capias* upon which the defendant had been arrested, described him as F. W. Hankin. On a motion that the bail bond should be delivered up to be cancelled, and the defendant discharged on common bail, the Court, after taking time to consider the question, resolved that it was irregular to describe a person by the initials of his christian name only, and made the rule absolute. See 1 Chit. Rep. 398.

(C) *NEGATIVE A TENDER IN BANK NOTES.**

(a) *Statement of the sum tendered.*

Where the debt sworn to contains the fractional part of a pound, negating a tender in bank notes of the said sum, not adding, "or any part thereof,"

* The statute 37 Geo. 3, c. 45, § 9. (see also 37 Geo. 3, c. 91, § § 8, 9; 38 Geo. 3, c. 18; 51 Geo. 3, c. 127; 52 Geo. 3, c. 50; 53 Geo. 3, c. 5; 54 Geo. 3, c. 52; 59 Geo. 3, c. 49, § 1; 1 & 2 Geo. 4, c. 26.) enacts, that during the continuance of the restriction on payments by the Bank of England in cash, no person shall be held to special bail upon any process issuing out of any court, unless the affidavit made for that purpose under the statute 12 Geo. 1, c. 29, § § 1, 2, shall not only contain the matters thereby required, but also that no offer has been made to pay the sum mentioned and sworn to therein in notes of the Governor and Company of the Bank of England, expressed to be payable on demand, fractional parts of 20s. only excepted; and if any process shall be issued upon which any person might, before that act, have been held to special bail, and no such affidavit is made, no

The term 'manufacturer' is a sufficient addition.

And *semd.* the descriptive statements of the deponent's place of abode and place of residence are as essential in the C. P. as in the K. B. *Sed qu.*

An affidavit of debt omitting the word 'oath' is valid.

The defendant must be described by his christian name and surname at full length and not by initials of the former.

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or confining it to the integral sum, is insufficient; for *non constat*, a tender of bank notes may have been made of all but the fractional part. (*Jennings v. Mitchell*, M. T. 1800, K. B. 1 East, 17; see *Tidd*, 7th ed. 210, n. f.) But if the affidavit to hold to bail be for a principal sum and upwards, it will be a sufficient compliance with the act to negative a tender of the said sum in bank notes, that allegation having reference to the principal, which was such as might have been tendered in bank notes (*Maylin v. Townshend*, M. T. 1801, K. B. 2 East, 1,) though if the negative of the tender could not, consistently with a proper construction of the affidavit, refer to the integral sum mentioned, and capable of being tendered in bank notes, the affidavit would be defective, as where the plaintiff deposed that the defendant was indebted to him in 16*l*. and upwards, and negated a tender in bank notes of the said sum of 16*l*. and upwards, it was considered inaccurate, as the words denying the tender expressly referred to a sum exceeding 16*l*. (*Ford v. Lover*, M. T. 1802, K. B. 3 East, 110.)

(b) *Description of the notes.*

If in the clause of the affidavit, negating the tender of bank notes, they be described as notes on the Bank of England, "payable on demand," it will be a sufficient compliance with the statute of 37 Geo. 3, c. 45, s. 9, notwithstanding the words used in that act are "expressed to be payable on demand." (*Fowler v. Morton*, M. T. 1799, C. P. 2 B. & P. 48.)

(c) *Description of the person stated not to have made the tender.*

As negating an offer to pay the defendant excludes the possibility of any tender having been made on his behalf, an affidavit stating that the defendant made no tender to pay in notes of the Bank of England is sufficient, without saying, "or by any person on his behalf." (*Wyatt v. Smee*, M. T. 1798, C. P. 1 B. & P. 344.) And even where the tender was disaffirmed in indefinite terms, without saying by whom, the affidavit was considered unexceptionable, as that general denial comprehended every particular mode in which the tender could have been made, and satisfied the object of the statute. (*Armstrong v. Stratton*, E. T. 1817, C. P. 7 Taunt, 405; 1 B. Moor, 110, S. C.) But see 1 *Tidd*, 7th edit. 209, where it is said that in the King's Bench, an affidavit that the defendants had not tendered the said sum or any part thereof in Bank of England notes was held insufficient; Lord Kenyon having observed that the Court had better abide by the words of the act of parliament. MS. M. T. 42 G. 3.

person shall be arrested on such process, but proceedings shall be had as if no such affidavit had been made to hold him to bail, as required by the statute 12 Geo. 1, c. 29, pl. 23.

By the 43 Geo. 3, c. 18, it is provided, that in case of application made to any court in Westminster Hall by any person held to special bail, by virtue of any process of such court, to be discharged on common bail, by reason of any defect in such part of the affidavit as negatives, or is intended to negative any offer having been made to pay the sum therein mentioned in bank notes, such person shall not be entitled to such discharge, unless he, at the same time, make proof by affidavit that the whole sum for which he has been or was before such holding to bail offered to be paid, either wholly in such notes, or partly in lawful money of this kingdom. Anterior to the introduction of the latter statute, numerous cases had occurred in which the most trifling and minute deviation from the words prescribed in the statutes 37 Geo. 3, c. 45, was considered as fatal, and entitled the defendant to be discharged out of custody upon filing common bail; nor has the legislature, by passing the 43 Geo. 3, c. 18, dispensed (*Wood v. Jenkins*, M. T. 1804, K. B. 2 Smith, 156; 1 *Tidd*, 7th edit; S. C. *Crooks v. Holdich*, 1 B. & P. 176,) with a general averment that no tender has been made; it has only aided mere technical or formal inaccuracies, where a counter affidavit is not adduced on the part of the defendant, in which it is distinctly stated that a tender of bank notes has been actually made. But as the restrictions on payments in cash ceased on the 1st May, 1823. (59 Geo. 3, c. 49, s. 1.) and as the negatives of a tender in bank notes was only required during the continuance of those regulations the numerous decisions connected with this branch of the subject are now of no practical utility; it has been thought preferable, instead of abridging the cases, merely to introduce in the text the general rules deducible from them. It may not be improper to state, that bank notes are not made a legal tender by 37 Geo. 3, c. 45, but were intended by the legislature merely to exempt the party from arrest after tendering them in payment; *Grigby v. Oakes*, M. T. 1801, C. P. 2 B. & P. 526; *Wright v. Read*, H. T. 1790, K. B. 3 T. R. 554.

(d) *How negative of tender to be stated when affidavit made by creditor.*

Where the creditor resides here, and the affidavit is made by him the allegation that no tender has been made should be direct, positive, and unequivocal. Swearing to the best of the party's knowledge and belief that no tender has been made is not a sufficient compliance with the section of the act.

(e) *When made by a partner.*

An affidavit by one partner should negative a tender of bank notes to himself in express and positive terms, and deny that any tender has been made to his coparceners, or either of them, to the best of his knowledge and belief. (*Stacy v. Federici*, E. T. 1801, C. P. 2 B. & P. 390.)

(f) *When made by an agent, the principal being in England.*

It may be stated as a general proposition, that where the principal resides in England, it is not sufficient for his agent to negative a tender of the debt in bank notes to the best of his belief, but it ought to be stated in positive terms that no such tender has been made. See *Cass v. Levy*, E. T. 1800, K. B. 8 T. R. 520; *Knight v. Keyte*, E. T. 1801, K. B. 1 East, 415; *Elliott v. Duggan*, M. T. 1801, C. B. 2 id. 24. The observations of Mr. Justice Best, in *Brown v. Davis*, H. T. 1819, K. B. 1 Chit. Rep. 161; see *Mayor, &c. of London v. Dias*, H. T. 1801, K. B. 1 East, 237, (in which he is reported to have said, that it is not necessary that an agent should expressly negative a tender of bank notes, if enough can be collected from the language of that part of the affidavit to show that it was not made,) cannot be viewed as having qualified the above position; as in that case no affidavit on the part of the defendant was adduced, alleging that an actual offer of bank notes had been made. As the Court cannot be aware of what means an agent may have of satisfying himself of the fact, whether a tender has or has not been made, a deposition in the Court of King's Bench will not be rejected, because the agent of the plaintiff has ventured to negative, in unequivocal terms, a tender of bank notes to his principal, as well as to himself, although it is not stated therein that the plaintiff is resident in a foreign country. (*Knight v. Keyte*, E. T. 1801, K. B. 1 East, 414; *Maddox v. Abercromby*, H. T. 1801, K. B. cited Tidd, 7th edit. 211. n. e; *Brown v. Davis*, H. T. 1819, K. B. 1 Chit. Rep. 161.) Until lately it was thought that an agent in the Court of Common Pleas could not expressly negative a tender to his principal, (*Smith v. Tyson*, M. T. 1800, C. P. 2 B. & P. 339; *Hammersley v. Mitchell*, E. T. 1801, K. B. id. 389.) unless it could be collected from the whole context of the instrument that he was enabled to do so from peculiar circumstances, (*Chatterley v. Finch*, E. T. 1801, C. P. 2 B. & P. 390.) which might be disclosed by a supplemental and explanatory deposition. (*Bolt v. Miller*, E. T. 1801, C. P. 2 B. & P. 420; *Lawson v. McDonald*, M. T. 1861, C. P. id. 590.) But from a recent case (*Byland v. King*, H. T. 1817, C. P. 7 Taunt. 275; 1 Moore, 24. S. C.; *Polleri v. De Souza*, M. T. 1811, K. B. 4 Taunt. 154; *Andrioni v. Morgan*, id. 231.) it appears that that Court has now assimilated its practice to the Court of King's Bench. [422]

(g) *When made by an agent, the principal being abroad.*

When the principal resides abroad, it is a fixed and established rule that the agent need not expressly deny that the debtor has not offered to pay the demand in bank notes. It is sufficient if he allege his belief that no such tender has been made. (*Munro v. Spinks*, T. T. 1799, K. B. 8 T. R. 284.)

See 1 East, 237, 445.

Where the assignee of a chose in action positively disaffirms a tender in bank notes to his assignor, it is unnecessary for the latter to be joined in the affidavit. (*Byland v. King*, H. T. 1817, C. P. 7 Taunt. 275. 1 Moore, 24, S. C.)

(h) *When made by the assignee of a bankrupt.*

Prior to the stat. 43 Geo. 3. c. 18. § 2. it had been determined that it was not only essential that an affidavit made by the assignee of a bankrupt should negative a tender of the debt in bank notes to himself or co-assignee, but the deposition should also contain an averment that no tender had been made to [423]

AFFIDAVIT OF DEBT.—*Of the Jurat.*

the bankrupt. (*Martin v. Ransø*, H. T. 1800, K. B. 8 T. R. 455; *Smith v. Barclay*, M. T. 1802, C. P. 3 B. & P. 219.) Since the passing of that act, it would, however, appear to be sufficient to swear generally, that no offer to pay the debt in bank notes has been made. (*Armstrong v. Stratton*, E. T. 1817, C. P. 7 Taunt. 405; 1 B. Moore, 110, S. C.) When the affidavit is sworn to by one of several assignees, it is only requisite for the deponent to make a positive denial of a tender in bank notes to himself, and negative a tender to his co-assignee to the best of his knowledge and belief. (*Cresswell v. Lovell*, M. T. 1799, K. R. 8 T. R. 418; *Lawson v. McDonald*, M. T. 1801, C. P. 2 B. & P. 590; *Smith v. Barclay*, M. T. 1801, C. P. 3 B. & P. 220.) In practice it is usual for the bankrupt and one of the assignees to join in the affidavit; the former disavowing a tender in bank notes, antecedent, and the latter posterior, to the bankrupt.

(i) *When made by an executor.*

As an executor or administrator has no means of ever acquiring a belief whether a tender has been made to his testator or intestate, it appears that an affidavit made by personal representatives need not negative a tender in bank notes to the deceased. (*Percy v. Powell*, H. T. 1802, C. P. 3 B. & P. 6.) *Rooke, J.* said he thought it unnecessary for plaintiffs suing in the character of administrators to negative a tender to their intestate. *id.*

(j) *When a negative of tender is required with reference to the form of action.*

The several statutes requiring a tender in bank notes to be negatived, do not apply to the case of a defendant holden to bail in an action founded in tort, and for which he could only be arrested by permission of the Court, or under a judge's order. Hence a defendant arrested in trover cannot be discharged out of custody, on an objection to the form of an affidavit for not negativing a tender in bank notes, although the application be found on an affidavit stating that the value of the subject matter of the action has been, in point of fact, actually tendered to the plaintiff, before the writ was sued out. (*Anon. T. T. 1817. Ex. 4 Price*, 306.)

(k) *When required; when affidavit made out of England.*

An affidavit made out of England for the purpose of holding a party to bail, ought in general to contain all the requisites essential to the validity of an affidavit prepared in this country; and therefore it was deemed necessary in a deposition sworn in Ireland for the purpose of arresting the defendant in England, that it should be averred that he had not made a tender of bank notes. (*Nesbitt v. Pynn*, M. T. 1797, K. B. 7 T. R. 376. *S. P. Stewart v. Smith*, M. T. 1797, C. P. 1 B. & P. 132. n; and if an affidavit be made here to be used in Ireland, a clause denying a tender in Irish, as well as English bank notes, ought to be inserted, (*Tidd*. 209. 7th ed.)

(l) *At what time advantage ought to be taken of an omission in negativing a tender of bank notes.*

Where there is a defect in the allegation negativing a tender of bank notes which renders the affidavit insufficient, application should be made to the Court, in the earliest stage of the proceedings, to obtain the party's discharge; and before any subsequent steps have been taken in the cause, as advantage cannot be taken of such an irregularity after bail above has been put in. Per *Bayley, J.* 1 M. & S. 230; or have justified, *Jones v. Price*, M. T. 1800, K. B. 1 East, 80; or after plea, 7 T. R. 376. n; or judgment by default, and notice of executing a writ of inquiry. *Desborough v. Copinger*, M. T. 1798, K. B. 8 T. R. 77.

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An affidavit
of debt for
a special ca-
pias sworn
at the Bill
of Middle-
sex office,
instead of
before the
filacer is a
nullity;

(D) OF THE JURAT.

(a) *Before whom to be sworn in England.**

1. *DALTON v. BARNES*, H. T. 1813, 1 M. & S. 230.

A special *capias* has issued upon an affidavit sworn at the Bill of Middlesex office, upon which the defendant had been arrested, and a rule obtained

* The affidavit may be sworn before a judge of the court out of which the process is-

to show cause why he should not be discharged on common bail. In showing cause against the rule, it was contended that the practice was for the filacer to issue his writ upon the original affidavit, or upon an office copy of it being transmitted to him. But the Court considered that such could not be the proper mode of proceeding, for that an affidavit made for one specific object could not be transferred to another, and perjury could not be assigned on the office copy.

2. *ANDERSON v. HAYMAN*, E. T. 1818, C. P. 2 Moore, 192; S. C. 8 Taunt. 242.

On a rule to show cause why the defendant should not be discharged out of custody, on entering a common appearance; it appeared that an affidavit of debt was filed with the filacer for the county of D. the defendant not being found in that county, an office copy of the former affidavit was filed with the filacer for L. upon which a second *capias* issued to the sheriff's of L. and upon the return thereof, a *capias* by continuance was issued to the same sheriff of L. upon which he was held to bail. Or an affidavit sworn before the filacer of D. is not available in the city of L. [425]

In support of the rule it was contended, that to authorise the issuing a *capias* in a second county, a fresh affidavit of debt must be filed with the filacer of the latter county. *Per Cur.* In order to entitle a creditor to arrest his debtor, there must be an affidavit of debt sworn and filed before the filacer of the county can legally issue the process. Has that requisite been complied with? Here the affidavit was sworn and filed before the filacer of the county of D. when it should have been before the filacer of L. from whom the *capias* issued: hence the proceedings taken in the cause are irregular, and the defendant would have been entitled to his discharge, if he had not have waved the irregularity by putting in special bail. Rule discharged.

(b) *Before whom to be sworn in Scotland or Ireland.*

FRENCH v. BELLOW AND ANOTHER, E. T. 1813, K. B. 1 M. & S. 302.

This was an application for discharging the defendant out of custody, on the ground that the affidavit on which he had been arrested was insufficient, it purporting to be sworn before the C. J. of the Court of K. B. in Ireland; and bearing his signature, the genuineness was verified upon oath, but "no place was mentioned in the jurat." A judge had granted an order to arrest the defendant. *Per Cur.* As we cannot assume that the C. J. of Ireland has exceeded the powers vested in him, we must take it for granted that he has acted within his jurisdiction. The production of the document now objected to was sufficient to enable the judge to grant an order for the defendant's arrest; the practice of requiring such a deposition is merely to give the judge to whom the application is made, some particulars for the guidance of his discretion; it clearly shows the existence of the debt; and from the high office of the person whose signature the affidavit bears, we ought to give credence to it as done conformable to the authority vested in him. Rule refused. See *O'Meally v. Newell*, 8 East, 364; 1 Lee, Dic. Pract. 18; and observations thereon, in *Petersdorff on Bail*, 187. An affidavit purporting to be sworn before the C. J. of Ireland, and bearing his signature is sufficient to entitle a judge's order to hold a defendant to bail.

(c) *Before whom to be sworn abroad.*

1. *O'MEALLY v. NEWELL*, E. T. 1807, K. B. 8 East, 364.

A rule *nisi* was obtained to discharge the defendant out of custody, on the ground that the affidavit on which he had been held to bail was untenable. It appeared that the affidavit had been made at Paris, before a person of the name of Bonomee, who stated "that it was sworn at Paris on a certain day, before me, notary public, magistrate competent in this behalf, and duly authorised by the laws of France to administer oaths and take affidavits. Signed D. E. F. Bonomee. Upon the production of an affidavit made here, verifying the officer's signature, and his authority, a judge granted an order to hold the defendant to bail. In the course of the argument, the case was said to involve four cases; or before a commissioner duly authorised (29 Car. 2, c. 5,) for that purpose; or before the officer issuing the process or his deputy. And it may be sworn before a commissioner, notwithstanding he is concerned as attorney for the plaintiff. See R. E. 15 Geo. 3; Reg. Gen. 2 K. B.; R. E. 13 Geo. 2, C. P.; 3 T. T. 403; 3 B. Moore, 325; 1 Rose, 145; 6 Price, 230; Wight, 62. An affidavit made a broad coup led with a deposition made here verifying the officer's signature & authority is sufficient to obtain a judge's order to hold defendant to bail. [426]

questions: 1st. Whether since the 12 Geo. 1, c. 39, a person can be held to special bail unless he has complied with the terms of that act of parliament. 2d. If he can, whether he may be held to bail on an affidavit made out of England. 3d. Assuming that he may be arrested on an affidavit made out of England, whether there is any difference in respect of affidavits made in Ireland or Scotland, and those made in foreign countries. 4th. Whether a party making or using knowingly an affidavit, which is false, made abroad, can be punished for the offence here. *Per Cur.* Before we can determine the first point it will be necessary for us to consider the first clause of the act which applies to this case; the mode which the plaintiff is to pursue is express and clear; for the statute directs, "that the plaintiff must, in order to entitle him to hold the defendant to bail, proceed by affidavit made and filed, and by indorsement on the writ; and unless this direction be complied with, the act prohibits the defendant's proceeding to arrest." Now this appears to us only to refer to an arrest made as prescribed by the statute, and not an arrest made by the direction, or under the act of the Court. Consequently we are of opinion, from the wording of the act, that a party may be held to bail under a judge's order, without having pursued the provisions of the statute; as to the next questions, it is palpably clear, that an affidavit made in a foreign country is inadmissible to obtain a judge's order, to hold a defendant to bail, and if we were to decide otherwise, it would be unreasonable and unjust, for foreign countries receive and acknowledge our depositions, and we should be excessively sorry to narrow the measure of justice to foreign states, more than they are in the habit of adopting when administering the benefit of their laws to us. 3d. We are of opinion that if we were to hold there was a distinction between affidavits made in Ireland or Scotland, and those made in a foreign state, it would be without a difference; therefore all the questions are disposed of but the last; and that is clear beyond all doubt, that any person making a false or fraudulent deposition in order to pervert the course of justice, is guilty of an offence punishable by indictment. Rule discharged. See *Roberts v. Slingsby*, 2 Keb. 101; *Wolrand v. Van Moses*, 8 Mod. 323; *Rios v. Belifante*, 2 Stra. 1209; *Van Morsell v. Julian*, 1 Wils. 231; *Powis v. Ludvigsen*, 2 Burr. 655; *ex-parte Worslee*, 2 H. Bl. 275; *Dalmer v. Barnard*, 7 T. R. 251; *Worsley v. Harrison*, Dyer, 249; *Rex v. Mawbey*, Hob. 205; *Rex v. Crossley*, 7 T. R. 315; 2 East, P. C. 821; 2 Hawk, c. 22, s. 1, 38 & 39; 23 H. c. 10; *Prac. Reg.* 107; 13 Car. 2, c. 3, 8 Mod. 322.

A British consul verifying an affidavit at Paris must state his addition.

[427] An affidavit not entitled and only subscribed with the words by the Court, is inadmissible.

See *semb.* an affidavit of debt not entitled, but purporting to be sworn at the filacer's office and before a filacer is sufficient.

2. THURLT V. FABER, T. T. 1819, K. B. 1 Chit. Rep. 463.

A rule was obtained to shew cause why the defendant on filing common bail should not be discharged out of custody on the ground that the affidavit was sworn at Paris before the British chief consul, who had omitted to give himself a proper addition. *Per Cur.* As the addition of the consul, and the parties deposing, was essentially requisite, the defendant must be discharged on the terms prayed.—Rule absolute.

(d) *Statement in jurat when sworn in Court.*

1. *MOLLING v. POLANA*, T. T. 1814, K. B. 3 E. & S. 157; S. P. *SYMMERS v. WATSON*, 1 B. & P. 105.

The affidavit was not entitled in any court, but purported to be sworn in court; the words "By the Court," being subscribed at the bottom of the jurat. It was rejected as inadmissible, the court not taking judicial notice of the master's hand-writing. See the *King v. the Justices of the West Riding of Yorkshire*, 3 M. & S. 493; *Osborn v. Tatum*, 1 B. & P. 271; *Bland v. Drake*, 1 Chit. Rep. 165; the *King v. Hare*, 13 East, 189; *French v. Belpurporting* law, 1 M. & S. 302.

2. *BLAND v. DRAKE*, H. T. 1819, K. B. 1 Chit. Rep. 165.

A rule was obtained to show cause why the defendant, on filing common bail, should not be discharged out of custody, on the ground that the affidavit on which he had been held to bail was insufficient, because it was not entitled in court, nor sworn before a judge of the court, but purported to be

"sworn at a filacer's office before A. &c. filacer." *Per Cur.* It is sufficient, as the court will take judicial notice of the filacer, being one of its officers.

(E) DURING WHAT TIME THE AFFIDAVIT CONTINUES IN FORCE.

1. COLLIER V. HAGUE, T. T. 1747, K. B. 2 Stra. 1270.

The plaintiff prior to going abroad made an affidavit in 1744, that the defendant was indebted to him in 277*l.* for goods sold and delivered. On this affidavit, in 1747, the defendant was arrested. But the Court ordered the defendant to be discharged on common bail, on the ground that though in 1744 he might owe the debt specified in the affidavit, yet he might have paid it in the interval.

2. ANONYMOUS, T. T. 1817, C. P. Cited Archibald's Practice, K. B. 57.

A writ had been issued soon after the making of the affidavit, and the process regularly continued until the time of the defendant's arrest, which did not take place for upwards of three years; the Court of Common Pleas held the length of time which had elapsed between the swearing of the affidavit and the caption of the defendant no objection; and refused to discharge him on a common appearance.

(F) OF SUPPLEMENTAL AND EXPLANATORY AFFIDAVITS.

(a) *In the King's Bench.*

1. TURNER V. WARREN, M. T. 1737, K. B. Andrews, 70: S. C. not S. P. 2 Stra. 1079.

The plaintiff had brought an action for 200*l.* as the loser at play, on the 9th Ann. c. 14, and the defendant had been held to special bail on an affidavit stating, that "he was indebted to the plaintiff in 151*l.* for money won of him at play," without mentioning "how much was won at each time." On a rule obtained to show cause why the defendant should not be discharged out of custody on filing common bail, the plaintiff produced an affidavit that 49*l.* were won at one time, and several other sums at other times, amounting to more than 10*l.* at each sitting; the several sums in the aggregate being 151*l.*; and that the money was lost within three months before the commencement of the action. The admission of this affidavit was opposed as contrary to the general practice, but the Court permitted it to be read, as it was explanatory only. —Rule refused.

2. HEATHCOTE V. GOSLIN, T. T. 1740, K. B. 2 Stra. 1157. S. P. COPE V. COOKE, M. T. 1780. K. B. 2 Doug. 467.

The affidavit referred to the document upon which the action was brought, instead of distinctly alleging the existence of the demand. The plaintiff offered a supplemental affidavit but the Court refused to receive it, for the act of parliament requires a positive and perfect affidavit previous to the issuing the process, and antecedent to the party's arrest.

3. MACKENZIE V. MACKENZIE, E. T. 1787, K. B. 1 T. R. 716. S. P. JACKS V. PEMBERTON, E. T. 1794, K. B. 5 T. R. 552.

Per Buller, J. There is a difference between the practice of this court and that of the Common Pleas. In this court the affidavit must be positive as to the debt; but there the defendant is suffered to file a cross affidavit, and the plaintiff may afterwards file an additional one, in order to supply the defects of the first. Therefore, as no cross affidavit is permitted to be filed in this court, in answer to the plaintiff's, it is absolutely necessary that the affidavit on which the defendant is held to bail should be positive.

4. MOLLING V. BUCKHOLTZ, E. T. 1814, K. B. 2 M. & S. 563.

Per Lord Ellenborough, C. J. Although an affidavit upon which a judge grants an order to hold a defendant to bail be insufficient, yet the Court will not permit a supplemental affidavit to supply any defect, since the deponent may apply to the judge for a new order.

5. HOBHOUSE V. HANSELL, Cited 1 Burt, Ex. Prac. 117.

An affidavit alleged that the defendant was indebted in 40*l.* without any statement of the cause of action; and the plaintiff, on discovering his mistake, made a proper affidavit before a warrant had been granted by the sheriff. The

affidavits to explain an affidavit before a process sued out, yet it can never be intended as the ground of the process, but of the arrest only."

(b) *In the Common Pleas.*

1. RECK v. GRONEMAN, H. T. 1764, C. P. 2 Wils. 224.

The affidavit was sworn to by the plaintiff in these words; T. R. of, &c. merchant, maketh oath that J. G. of the same place, musician, in justly indebted to this deponent in the sum of 12l. for, &c. It was objected that this was no allegation of the existence of the debt, it being averred that the defendant was in justly instead of is justly, upon which a supplemental affidavit was offered. To this the practice of the King's Bench was opposed, that Court, it seems, never admitted any supplemental affidavit whatever. After two arguments judgment was delivered. Per Pratt, C. J. I own that upon the first debate of this matter I was inclined to receive a supplemental affidavit to make this good, which is nothing more than a mere slip of the pen in a single letter. When I considered it again, upon what has been further said, it appears to be a matter of great consequence, considering that the point is raised upon a statute made in favour of the liberty of the subject, which in effect says, that no man for the future shall be arrested before an affidavit of the debt is made and filed with the proper officer. Now it is certain this is no affidavit, because perjury cannot be assigned upon it; this is an arrest contrary to law; and shall this Court, or can it, make that lawful which the law says is unlawful? I do not find this Court has ever gone so far as to admit a supplemental affidavit where the first amounted to no oath at all, but has been received only to supply small defects in affidavits which have not been quite full enough as in the cases cited of executors and administrators, in which the King's Bench has never concurred; and I have therefore changed my opinion, and agree with my brothers Clive and Gould, that the rule must be made absolute for a common appearance.

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If the affidavit does not contain any positive oath;

Clive and Gould, Justices, were of the same opinion, and thought that an action for false imprisonment would lie against the plaintiff and the filicer; but Bathurst, J. was of opinion it would not lie; as to the common appearance he seemed to agree with the rest of the Court, and the rule was made absolute.

2 NICHOLS v. DALLYHUNTY, E. T. 1737, C. P. Barnes, 79; S. C. Pr. Reg. 49; S. P. BALL v. MILLER, E. T. 1801, C. P. 2 B. & P. 420.

The affidavit of debt had been made by a person who had been convicted of felony, and the Court having rejected the deposition on that ground, the plaintiff offered to produce a supplemental affidavit to prove that the defendant had confessed the debt, and that he intended to abscond into Ireland.

Or is made by a person convicted of felony;

Per Cur. The original defect in the affidavit having been made by an incompetent deponent, cannot be now supplied. See Bland v. Drake, 1 Chl. Rep. 165; ante, p. 380.

3. STEWART v. SMITH, M. T. 1797, C. P. 1 B. & P. 132. n.

The affidavit had omitted to negative a tender of bank notes. Application was made for leave to file a supplemental affidavit. *Sed per Cur.* We have conferred with the judges on the construction of this act, and think that a supplemental affidavit cannot be allowed. Rule absolute.

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Or does not negative a tender in bank notes;

4. COOKE v. DOBREE, E. T. 1788, C. P. 1 H. Bl. 10.

It did not appear from the affidavit in what manner the debt had arose; it merely alleged that the defendant was indebted to the plaintiff in the sum of 500l. and upwards. The plaintiff applied for leave to file a supplemental affidavit; but the Court refused to comply with the request, and made the rule absolute.

Or disclose any cause of action; Or that a bill of exchange was due, the Court will not receive a supplemental affidavit.

5. SANDS v. GRAHAM, M. T. 1819, C. P. 4 Moore, 18.

A rule was obtained to show cause why the defendant should not be discharged on entering a common appearance, on the ground that the affidavit on which he had been arrested was insufficient, it being necessary to state not only the date of the bill, but that it was due at a day before the defendant was arrested; here it does not appear that the bill was due at that time. For

the plaintiff it was argued, that even if it was not sufficient, it could not be considered as a nullity, as the defect might be supplied by a supplemental affidavit. *Per Cur.* This affidavit is not tenable, nor does the case fall within the rule for allowing supplemental affidavits. Rule absolute.

6. *GREEN v. REDSHAW*, E. T. 1798, C. P. 1 B. & P. 227. S. P. *HOBSON v. CAMPBELL*, T. T. 1789, C. P. 1 H. Bl. 245.

In the affidavit the defendant was not distinguished by that appellation, although the document itself was entitled, W. C. plaintiff, v. S. R. defendant. A rule was obtained, and made absolute, for discharging the defendant. The Court rejected a supplemental affidavit, observing that it was never admissible unless to supply something ambiguous on the face of the original deposition, and which the Court, for its own satisfaction, was desirous of having explained. See *Manning v. Williams*, Barnes, 87.

7. *HOLLIS v. BRANDON*, E. T. 1797, C. P. 1 B. & P. 36.

The affidavit was entitled in the cause and stated that W. B. defendant, was indebted, &c.; in the other parts of the deposition he was described by the appellation of defendant only. A motion was made that he should be discharged on entering a common appearance. The Court, however, intimated that the plaintiff might file a supplemental affidavit, but judgment was afterwards delivered on a collateral ground; Buller, J. observing, "It has been said, that if the plaintiff was indicted for perjury, there might be a doubt whether he could be convicted on a supplemental affidavit. Have not the Court jurisdiction? An application is made to them to discharge the defendant in the regular exercise of their jurisdiction; they require a second affidavit to ascertain the debt; there can be no difficulty, then, in the assignment of perjury."

8. *GARNHAM v. HAMMOND*, M. T. 1806, C. P. 2 B. & P. 298. S. P. *ROCKE v. CAREY*, M. T. 1772, K. B. 2 Bl. 850.

A rule was obtained to show cause why the defendant should not be discharged out of custody on entering a common appearance, on the ground that the affidavit of debt merely stated "that the defendant was indebted to the plaintiff as executor, as appears by the testator's books," without adding, "which the deponent verily believes." On showing cause it was submitted that even though it was insufficient in its present form, it might be remedied by a supplementary affidavit, and *Rocke v. Carey*, 2 Bl. 850, was relied on; and *Per Cur.* A supplementary affidavit may be filed. See *Green v. Redshaw*, 1 B. & P. 227; *Barclay v. Hunt*, 4 Burr. 1992; *Sheldon v. Baker*, 1 T. R. 83; *Swayn v. Crammond*, 4 T. R. 176; *Hobson v. Campbell*, 1 H. Bl. 245; *Reeks v. Groneman*, 2 Wils. 224.

9. *LAWSON v. M'DONALD*, M. T. 1801, C. P. 2 B. & P. 590.

On a rule to show cause why the defendant should not be discharged out of custody on entering a common appearance, as the affidavit (which was made by a third person) only stated "that defendant was indebted to A. formerly a prisoner, who had been since discharged under the insolvent act, for goods sold and delivered before his taking the benefit of the act, and that the defendant was about to sail for Jamaica, as J. E. this deponent, believes; and further, that the effects of the said A. vested in plaintiff, in trust for the benefit of the creditors of A. as deponent believes, and that no tender had been made in notes of the Bank of England, to the knowledge or belief of this deponent;" without showing, 1st. That J. E. the deponent had any connexion with the parties to the action; 2d. That he only negatived the tender to his knowledge or belief. On showing cause it was contended, that although the affidavit might be irregular, and although no supplementary affidavit could be received to remedy any defect in the negative of a tender, yet affidavits might be admitted to explain the situation of the deponent, and to show that he was entitled to make such affidavit. The proposed affidavit stated, that the insolvent was not in town at the time when the arrest became necessary, and that his father, the deponent, had the management of his affairs when he was out of town, and that he had accordingly made the affidavit, and that it could not be necessary that the deponent should swear more

But such a document will be admitted to remove any ambiguity on the face of the original affidavit and which the Court for its own satisfaction is desirous of having explained; Or where the debtor is called defendant in stead of by name.

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An omission by an executor to swear to his belief may be remedied by a supplemental deposition. Although the Court will not in general admit a supplemental affidavit to remedy a defect relative to the negativing of a tender, yet it will receive a deposition showing that a party deposing negatives the tender with as much per

particularity as
his relative
situation
will admit.
[432]

than to his knowledge or belief. *Per Cur.* In deciding whether the supplemental depositions are admissible, we may apply the general rule, that the best evidence must be obtained that the case will admit of. Now the latter affidavits clearly show, that the deponent was in such a situation as entitled him to make the affidavit of debt, and that negating the tender to his knowledge or belief was sufficiently positive. Here, if the deponent had not made the affidavit, the defendant would have gone abroad, and the plaintiff would have been deprived of his debt for a protracted period.—Rule discharged.

10. *ARMSTRONG v. STRATTON*, E. T. 1817, C. P. 1 B. Moore, 110; S. P. 7 Taunt. 405.

Allowing
supplementa-
ry affidavits
to be read
is an indul-
gence that
ought
to be very
sparingly
conceded.

An affidavit of debt stated the defendant to be indebted to the plaintiff generally on a bond, conditioned for the performance of an award, which award directed one E. F. to pay a sum of money on demand. *Per Cur.* The affidavit is clearly defective; it does not show how the defendant was indebted, or that any demand was made on E. F. for payment. The question then is, whether a supplemental one is admissible. The practice of the Court of King's Bench differs from the Common Pleas; and although we are empowered to grant them, still it is an indulgence that ought to be seldom exercised. If supplemental affidavits were frequently received, the originals would be drawn with carelessness and laxity.

(G) OF CONTRADICTORY AND COUNTER AFFIDAVITS.

(a) *In the King's Bench.*

1. *ANON.* M. T. 1769, K. B. 1 Lord Raym. 383; S. C. 1 Salk. 99, pl. 7. S. P. *ANON.* H. T. 1769. 1 Salk. 100. S. P. *COPE v. COOKE*, M. T. 1780, K. B. 2 Doug. 467.

A counter
affidavit im-
pugning the
statement
in the plain-
tiff's depo-
sition, is in-
admissible;

A. had made a composition, with his creditors; and being sued by a non-subscribing creditor, he moved for leave to file common bail, upon a suggestion that the debt upon which the plaintiff brought his action, according to the proportion of his composition, would be less than 10*l.*; and since the plaintiff, though a non-subscribing creditor, was bound by that agreement, it was reasonable that common bail should be accepted. But the motion was opposed, because it would amount to a determination of the merits of the cause; and it was compared to the case of an usurious contract, where, though the contract be void, the defendant is compelled to give special bail. *Quod Curia concessit*; and refused to admit the affidavit.

2. *EMERSON v. HAWKINS*, M. T. 1752, K. B. 1 Wils. 335.

And even
to show
that the
plaintiff has
confessed
that the de-
fendant is
not really
indebted to
him.

The plaintiff deposed, "that the defendants were indebted to him in 103*l.* for goods of the plaintiff, which the defendants had converted to their own use." The defendants were arrested upon this deposition, and a motion made that they might be discharged out of custody upon common bail, on an affidavit that the defendants were officers in his majesty's customs, and had seized the property as prohibited, and had consequently deposited them in the king's warehouse. *Per Cur.* The plaintiffs having sworn positively that the defendants are indebted, it is the acknowledged practice of the Court to reject any affidavit to explain or contradict the plaintiffs oath; even an affidavit of the plaintiff's confession that a defendant owes him nothing cannot be received.

3. *SALTER v. SHERGOLD*, H. T. 1790, K. B. 3 T. R. 572.

Or that the
defendant
was not the
person de-
scribed in
the process.

The defendant having been arrested by the name of Shergold, and given bail in the action which was for the recovery of a penalty under the lottery act, he applied to have the bail bond, which he had executed in the name of Williams, given up, on an affidavit that the latter was his name, and that he had not signed the name of Shergold, and that he had not used or was ever known by that appellation. A deposition was then produced, made by the person who purchased the share of the ticket on which the action was brought, stating that the defendant acted as the owner of a shop where the share was purchased, and that he had sold and delivered the share signed Shergold; on which the Court refused to interfere in a summary way, but left the defendant to his plea in abatement.

4. *IMLAY v. ELLEFSEN*, T. T. 1802, K. B. 2 East, 453.

On a judge's order being obtained to hold the defendant to bail, on an affidavit stating "that the defendant was indebted to the plaintiff in a certain sum, being the value of goods, (naming them) delivered by the plaintiff to the defendant, to be by him carried and delivered to J. W. for the use and on the account of the plaintiff." A rule was obtained to show cause why the defendant should not be discharged out of custody on filing common bail, on the ground that it was in his power to disclose, by cross affidavits, new circumstances, invalidating the plaintiff's prior statements, by showing that the cause of action for which he was held to bail was prohibited by the laws of a foreign country, and that he had been before holden to bail for the same cause of action, which suit is still pending. *Per Cur.* We are of opinion that the plaintiff's affidavit cannot, under the circumstances, be controverted by the counter affidavit, and that the latter must be rejected; for if we were to receive it, it would be highly injurious; the merits of every case would be determined on such depositions. But if the defendant had been arrested in this country for the same cause, he might, by such a deposition, have shown that fact, in order to obtain his discharge, as it is clear, beyond all doubt, that this Court will not suffer a man to be holden to bail twice for the same cause. But this is not the case; here the defendant has been arrested in a foreign country, which renders it impossible for us to say what security the plaintiff obtains for his demand, not being acquainted with the nature of the laws in that country; indeed if we were to make this rule absolute, it would be contrary to reason and justice. Rule discharged. See *Melan v. Duke Fitz James*, 1 B. & P. 138.

Tho' counter affidavits, impeaching the facts connected with the merits of the case, are not available, yet the defendant may disclose, by cross affidavits, new circumstances not in validating the plaintiff's prior statements.

And an affidavit showing that the accounts between the parties had been settled at a less sum than the amount claimed by the plaintiff's having been received. [434] If there be a positive affidavit for the plaintiff and several as positive for the defendant, the former shall prevail.

5. *JACKSON v. TOMKINS*, M. T. 1815, K. B. 2 Chit. Rep. 20.

In this case, Dampier, J. admitted an affidavit on the part of the defendant that the account upon which he had been holden to bail had been settled in writing at a much less sum than the amount endorsed upon the writ.

(b) *In the Common Pleas.*

1. *RATCLIFFE v. GOODCHEAP*, M. T. 1742, C. P. 7 Mod. 458.

In an action of debt on a bottomry bond, the plaintiff made the following affidavit: "that the defendant was indebted to him in a certain sum, as appears by the bond; and further, that the ship on which the bond was given was not lost by unavoidable accident, but for want of care, as he, the said plaintiff has been informed, and verily believes." In answer to this, the defendant made a counter affidavit, stating "that all proper care was taken of the ship, and that she was lost by storms, and unavoidable accident. The plaintiff then produced an affidavit of one J. D. who was a sailor on board the vessel, wherein he swore positively that the ship was lost for want of proper care. The question to be determined was, whether upon these affidavits the defendant ought to be held to bail. *Per Willes, C. J.* It is incumbent on a plaintiff, in order to hold his debtor to bail, to show a probable cause. The general rule is, that there must be a positive affidavit; and where that can be obtained the Court requires it; but to this rule there are exceptions; for if from the nature of the demand a positive affidavit cannot be had, the Court will dispense with it, and admit the best and most certain that can be procured. Here is the positive affidavit of J. D. for the plaintiff, which answers the defendant's positive one; and wherever there is one positive affidavit for the plaintiff, though there are several equally positive for the defendant, yet he shall be held to special bail; therefore the rule for common appearance must be discharged. See 1 Lev. 260; 1 Show. 14; 6 Mod. 68; 2 Bulst. 64; 2 Stra. 1190; 2 Burr. 767; 1 Stra. 476; 4 Bac. Ab. 673.

2. *RUSSELL v. GATELY*, E. T. 1737, C. P. Barnes, 76; S. C. Ca. Prac. C. P. 148; S. C. Prac. Reg. C. P. 66. *HADDERWEEK v. CATMUR*, M. T. 1733, C. P. Prac. Reg. C. P. 63. *ANON.* cited per Gibbs, C. J. 2 Marsh, 549.

A judge had ordered bail for 200*l.* in an action for a malicious prosecution; the defendant moved for leave to enter a common appearance; and on its being shown that the plaintiff was not acquitted on the indictment upon the merits, admissible.

In actions for torts counter affidavits are admissible.

but upon a technical defect, and no precedent being produced of an order for bail in such an action, the rule to show cause why a common appearance should not be entered was made absolute.

3. *HORLEY V. WALSTAB*, M. T. 1816, C. P. 2 Marsh, 548.

But the privilege of using counter depositions does not extend to cases where the subject matter in dispute is a debt, and not a tortious injury.

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A party who has been arrested without a regular affidavit can not maintain an action for false imprisonment;

The plaintiff having filed a bill in equity, arrested the defendant in the C. P. on a proper affidavit for the same cause of action; but, in consequence of an order out of Chancery for that purpose, had elected to proceed in equity. In support of an application that the defendant might be discharged on a common appearance, an affidavit was offered to show that his liability arose from his fulfilling the character of executor. *Sed Per Cur.* Is it not an established rule, that the Court will not try the merits of the case on motion when the affidavit of debt is sufficient? When A. takes upon himself to swear that B. is indebted to him, we cannot discharge the defendant without deciding that no debt is due. Rule discharged.

(H) CONSEQUENCES OF THERE BEING NO AFFIDAVIT, OR THE AFFIDAVIT BEING DEFECTIVE.

1. *SMITH V. BOUCHER AND OTHERS*, M. T. 1733, K. B. 7 Mod. 173.

This was an action for an assault and false imprisonment against the judges of the vice chancellor's court at Oxford, the officer who executed the process and the gaol; the defendants justified under process of that Court, and in the justification they set forth a custom which had prevailed in the university, and was established by act of parliament, whereby the vice chancellor's court was empowered, on complaint made by any person that he has cause of action personal against another, stating on oath the damage he has sustained, and that he believes the person (against whom he has cause of action, will get out of the jurisdiction, to issue a writ to take and commit such person to gaol, unless he finds bail, until the next Court is holden; the plea then set out, that one of the defendants had received a cause of personal action against the plaintiff, which he made complaint of, &c. and that the damage he thereby sustained was, in his estimation, to the amount of one thousand pounds, and that he suspected the plaintiff would make his escape out of the jurisdiction; and that he made oath *de et super præmissis*, and so justified the imprisonment. Replication; that before the *capias* issued no affidavit of the cause of action was filed, as prescribed, by 12 Geo. 1. Demurrer and joinder in demurrer. For the defendant it was contended, that the replication is valid, because the statute does not make the process void, but merely inflicts a penalty on the officers for not complying with the requisites of the act. *Per Cur.* It is not unusual that affirmative laws should not controul particular customs; but here are negative words in the act, which will controul any particular custom inconsistent with the provisions of the statute. Supposing this to be a case within the act, then the question will be, whether this non-compliance with the direction of the 12 Geo. 1, will make the proceeding void? The judge or the officer may be liable to an action for not pursuing the statute where a person has received a particular injury thereby; or if it is a thing that is injurious to the public, it is an offence indictable; but still the proceedings in the action will not be affected by any such misbehaviour in the judge or officer, the replication is therefore insufficient. See *Wishard v. Wilder*, 1 Burr, 330; *Chapman v. Ryall*, Barnes, 415.

2. *WARE V. RACKETT*, H. T. 1735, C. P. Ca. Prac. 125.

Or obtain an attachment against the plaintiff.

On a rule to show cause why an attachment should not issue against the plaintiff upon the defendant's affidavit, stating that he had been held to bail on an affidavit which had not been filed, it appeared that the affidavit had been regularly made, but by mistake had not been put on the file. The Court not considering this a sufficient ground for an attachment, discharged the rule, but ordered the plaintiff to pay costs, on the defendant consenting not to bring an action.

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But if the affidavit be not filed with the

3. *HUSSEY V. BASKERVILLE*, K. B. cited in *REEKS V. GRONEMAN*, 1764; C. P. 2 Wils. 225.

A motion was made that the defendant might be discharged upon common

bail, there being no affidavit filed with the proper officer when the writ was proper sued out. On showing cause, an affidavit of the debt was proved to have been actually made, and sworn before the writ was sued out; but the clerk, when he took out the writ, had omitted to file it. The Court discharged the defendant from the arrest on common bail, because the affidavit of the debt ought to have been filed with a proper officer before, or at the same time the writ was sued out.

4. *TETHERINGTON v. GOULDING*, M. T. 1796, B. R. 7 T. B. 80; *S. P. WILKES v. ADCOCK*, M. T. 1798, 8 id. 27. *SPALDING v. MURE*, T. T. 1795, K. B. 6 T. R. 363.

The affidavit was an assumption; and the plaintiff having declared in trover, Or assen not by the bye, but in chief, the Court made a rule absolute for entering an tially differ exoneration on the bail piece. See 2 H. Bl. 278; 2 B. & P. 358; 7 Taunt. out from . 304; 1 B. Moore, 51; 2 Taunt, 107; 1 Chit. Rep. 659. the declara

5. ——— *v. REYNOLLS*, H. T. 1805, K. B. 1 Chit. Rep. 659. n. *ANON. M. T. 1813*, K. B. id. 669. n.

A rule to show cause had been obtained why defendant should not be dis- Or process, charged out of custody, the affidavit and writ being incongruous. In the writ the Court the defendant had been called Rennolls; but in the affidavit the final s was will dis omitted. It was insisted that the names were not *idem sonans*; but the Court charge the refused the rule, observing that a trifling error in the spelling of the name was out of cus not sufficient for discharging the defendant. today.

6. *DESBOROUGH v. COPINGER*, M. T. 1798, K. B. 8 T. R. 77.

After the defendant had suffered judgment by default, and the plaintiff had No objec given notice of executing a writ of inquiry, the former obtained a rule to tion can be show cause why he should not be discharged on filing common bail, on the taken to the ground that the affidavit on which he had been arrested had omitted to nega- the sufficiency tive any tender of the debt in bank notes, pursuant to the 37 Geo. 3. c. 45. of the affi Per Cur. An objection of this description should be taken advantage of in the davit to hold to bail first instance; here the defendant has permitted the plaintiff to proceed under after the plaintiff has a presumption that every thing was regular.—Rule discharged. See *Norton v. Danvers*, 7 T. R. 375; *Levy v. Daponte*, id. 376; *Fenwick v. Hunt*. been per mitted to take a sub id. n. a. sequent

7. *NORTON v. DANVERS*, M. T. 1797, K. B. 7 T. R. 375.

The affidavit omitted to negative a tender in bank notes; the defendant con- step in the; sequently moved that the bail bond should be delivered up to be cancelled. cause; In opposition to this application it was shown by affidavit that the defendant As giving a had voluntarily given a bail bond immediately on being informed that a writ voluntary bail bond; had been taken out against him. [437]

Per Cur. Had the defendant been actually under arrest at the time, his consent to give a bail bond would not have been binding, being executed under duress; but as it was in this case given voluntarily and whilst he was exempt from coercion, the rule must be discharged.

8. *D'ARGENT v. VIVANT*, H. T. 1801, K. B. 1 East, 330. *S. P. JARRETT v. DIPLOM*, M. T. 1800, K. B. 1 East, 18.

In this affidavit of debt the plaintiff described himself as of such a place, with- Or bail post out giving himself any addition. On a rule to show cause why the defendant in; should not be discharged out of custody on filing common bail, it was urged that this application was made too late, he having put in bail on the 27th. *Per Cur.* An objection of this description must be taken advantage of in the first instance; here bail was put in four days after the commencement of the term, during which period this application should have been made: consequently the irregularity is waved, and the rule must be discharged. See *Jones v. Price*, 1 East, 81; 1 M. & S. 230; 6 Taunt. 185.

9. *CHAPMAN v. SNOW*, M. T. 1797, C. P. 1 B. & P. 132. *S. P. STEWART v. SMITH*, id. note, *S. P. JONES v. PRICE*, M. T. 1800, K. B. 1 East, 81.

This was an application for leave to enter an exoneretur on the bail-piece, on the ground that the affidavit to hold to bail had not negatived a tender in Or perfect bank notes, pursuant to the requisitions of the bank restriction act. But it ed bail.

appearing that the defendant had put in and perfected bail above, and that a plea had been demanded. *Per Cur.* The defendant, by taking these subsequent steps in the cause, has waived the irregularity.

10 SHAWMAN v. WHALLEY, E. T. 1815, C. P. 6 Taunt. 135.

Or has been rendered by the bail.

A motion was made to discharge the defendant out of custody on account of a defect in the affidavit to hold to bail. It appeared that a bail bond had been given, and that bail above had been put in for the purpose of rendering the defendant, and they had in fact rendered him. *Per Cur.* The application comes too late.—Rule refused. See 1 East, 350.

Or pleaded to the action, the defendant can not object to hold to bail.

11. Levy v. DAPONTE, Cited in a note to NORTON v DANVERS, 7 T. R. 376.

Ruled that the defendant cannot take advantage of a defect in negating a tender after he has pleaded to the action.

Affirmation.*

1. REX v. THE MAYOR OF LINCOLN, E. T. 1767, K. B. 5 Mod. 303; S. C. 12 Mod. 190; S. C. Carth. 448.

A quaker may be admitted to the freedom of a city on his affirmation.

This was a motion to the Court for a mandamus to compel the mayor to admit one M. to the freedom of the city of L. as he had served seven years as an apprentice, which the Mayor had refused, the applicant had declined taking the freeman's oath, he being a quaker, but offered to make his solemn affirmation according to the late act 7 W. 3. c. 34. *Per Cur.* He ought to be admitted on his solemn affirmation, for the office of a freeman is no place of profit, or office, under the government, within the statute. By serving his apprenticeship he had a right to the freedom and his admission. The taking of an oath is not essential, but only by custom; and the intent of the act was, that, unless in those cases excepted by the proviso, the affirmation of a quaker should be as available as his oath.

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But their affirmation is not admissible in criminal cases, even to support an application for surety of the peace; Or on the trial of an appeal for murder;

2. HILTON v. BYRON, E. T. 1698, K. K. 3 Salk. 133. 247; 12 Mod. 243. S. C. S. P. REX v. GREEN, T. T. 1721, K. B. 1 Stra. 527.

A quaker moved for security of the peace against the defendant, and offered to make his affirmation that he was in danger of his life; but, *Per Cur.* This being a criminal matter, is not within the 7 & 8 W. 3. c. 34. and the application cannot be granted unless he will take the usual oath.

3. CASTELL v. BAMBRIDGE, H. T. 1729, K. B. 2 Stra. 856; S. C. Barnard, K. B. 204; Fitzb. 94; S. C. cited ATCHESON v. EVERITT, H. T. 1776. K. B. Cowp. 392.

On the trial of an appeal for murder, before Lord C. J. Raymond, the appellant's counsel called a quaker, and insisted that this was a civil suit, in which he might be a witness; but the chief justice observed, that with reference to the admissibility of such a witness, this must be looked upon as a criminal proceeding, and therefore his testimony could not be received.

4. REX v. WYCH, T. T. 1730, K. B. 2 Stra. 872; S. C. cited KING v. BELL. E. T. 1738. K. B. And. 200; Barnard, K. B. 346.

The Court refused to allow a quaker's affirmation to be read in a motion for

Or on a motion for a criminal information;

* This is an indulgence allowed to quakers, who, in cases where an oath is required from other sects, may make a solemn affirmation that what they depose is true. Before the Revolution, quakers, who refused to take a legal oath, were treated as obstinate offenders, and subject to penalties. But these hardships have since been removed by stat. 1 W. & M. c. 18. s. 13, which first allowed them to make a declaration of their fidelity to the state, instead of taking an oath of allegiance; and exempted them from all pains and penalties, on their making, if required, certain other declarations there prescribed; and now, by stat. 7 & 8 W. 3, c. 24, s. 1, it is enacted that every quaker, who shall be required, upon any lawful occasions, to take an oath, in any case where by law an oath is required, shall, instead of the usual form, be permitted to make his or her solemn affirmation, &c. with a proviso sect. 6, that no quaker shall be permitted to give evidence in any criminal causes. That act was only to continue in force seven years; but it was afterwards revived, and, by statute 22 Geo. 2, c. 46, s. 86, it is enacted, that in all cases wherein an oath is allowed or required, the solemn affirmation of a quaker shall be allowed and taken instead of such oath; provided (sect. 37,) that no quaker shall be permitted to give evidence in any criminal cases. This exception has been continued in the several succeeding acts of the legislature upon the subject; but the propriety of such a distinction seems questionable, unless it can be shown that evidence requires less sanction

5. THE KING v. BELL. E. T. 1738. K. B. And. 200.

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An action on a bye law having been brought by the bailiffs of S. and others, against R. and others, in which the plaintiffs were nonsuited; an attachment was granted against the plaintiffs, one of whom was Bell, for payment of the costs, whereupon S. a quaker, on the part of the plaintiffs, tendered the costs to M. one of the defendants, who accepted the same accordingly; and an attachment was now prayed against him for abusing the process of the Court by taking an unreasonable sum for costs; and an affirmation of S. was offered in support of the motion. But it was objected that this was a criminal case, especially as the cause in which this motion was made was entitled the King and Bell, and not the bailiffs of S. and R. and others; and consequently that the affirmation was no evidence by stat. 7 & 8. W. 3. c. 34. s. 6. On the other side it was argued that the affirmation ought to be received, because the original suit was a civil one, and consequently the present case could not be considered as of a criminal nature. And they cited Powell and Ward, E. T. 5 Geo. 2. where an attachment was prayed against a party for non-performance of an award, and the affirmation of a quaker in support of the motion, was allowed; and the Court then said that until an attachment is granted, there is no criminal suit in court, but that on a motion for an information an affirmation is never allowed. But the Court observed, that it made no difference whether the original suit be a civil or a criminal one; but it must be considered as it now stands on the present motion for an attachment, and this is a criminal prosecution. But the question being a very material one, and the counsel on both sides unprepared to argue it, the defendants' counsel, for the sake of expedition, consented to the reading of the affirmation.

6. SKIPP v. HARWOOD. M. T. 1741. C. P. Willes. 291.

Per Cur. We rejected the affirmation of a quaker, on a motion for an attachment for breach of a rule of *nisi prius* afterwards made a rule of Court; though it was said by the counsel, that it had been allowed to be read in the King's Bench, in order to obtain a rule *nisi* for an attachment, though refused to be read, when cause was shown, which seemed to us very absurd; the Court afterwards said, they did not believe that the Court of King's Bench would allow it, especially since it was refused to be read in that court in the case of *Oliver v. Lawrence*, 2 Stra. 946.

7. REX v. GARDNER. H. T. 1761. K. B. 2 Burr. 1117; S. P. Cowp. 392.

The defendant, upon showing cause why an information should not be exhibited against G. for a misdemeanour, the affirmation of a quaker was offered in exculpation. The reading of the affirmation was objected to by the prosecutor's counsel, and not much insisted upon by the counsel for the defendant.

The Court held clearly, that a quaker's affirmation could not be read in support of a criminal charge, but they thought that an affirmation might be read in defence of a criminal charge, if the person charged was himself a quaker, in order to effect his own exculpation. See *Hawk. P. C.* 62. c. 26. s. [440] 101; 2 H. P. C. 277.

8. THE KING v. SHACKLINGTON. H. T. 1734. K. B. cited And. 201.

Motion for information against defendant, a quaker, for refusing to act as sheriff of Y. after having been duly elected; against the application, his own affirmation was offered to be read, but opposed; and on this side was cited, (besides the King and Wyche,) — and *Lawrence*, 2 Stra. 946. where an affirmation of a quaker in support of a motion for answering the matters of an affidavit, was refused. But in the principal case, *Lord Hardwicke* inclined to think that the affirmation might be read; this being only to induce the discretion of the Court, and therefore is not strictly giving evidence, nor is this properly a cause.

9. TAYLOR v. SCOTT, cited in *ATCHESON v. EVERITT*. H. T. 1776. K. B. Cowp. 394. S. P. POWELL v. WARD. E. T. 1731. K. B. cited in *THE* in civil cases than in criminal; or that quakers, in making their solemn affirmation, do not consider themselves under a strictly religious obligation to speak the truth.

formance
of an
award;

KING v. BELL. And. 200. ELWOOD v. ELWOOD. M. T. 1735. C. P. Prac. Reg. 34. ROBINS v. SEYWARD. T. T. 1720. K. B. 1 Stra. 441.*

An attachment for the non-performance of an award was obtained upon a quaker's affirmation, and no objection was taken to its admissibility.

10. HUDSON v. JONES. M. T. 1735. K. B. And. 201. n.

Or against
bail, for
putting
them-
selves in
as bail
without
the know-
ledge of
the defen-
dant;

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Upon motion for an attachment against Owen and Chambelayne, the defendant's bail below, for putting themselves in as bail above, without the knowledge of the defendant, the affirmation of Owen, one of the bail, who was a quaker, was offered to be read, and opposed; but *Lord Hardwicke* strongly inclined to the reading it, especially as this was on the civil side; and, he said, there is as much reason for doing this now, as the examining him after the attachment on interrogatories. He also proposed, instead of a rule for an attachment, a rule for answering the matters of the affidavit; in which case, he said, it was clear the affirmation might be read. But the party consented to waive his affirmation, resting the matter on the affidavits.

11. REX v. TURNER, M. T. 1744. K. B. 2 Stra. 1219.

Or on mo-
tion to
quash an
appoint-
ment of
overseers;

A rule to show cause why an appointment of overseers should not be quashed, and on the affirmation of a quaker, was made absolute, this not being deemed a criminal prosecution, though on the crown side of the court, and the rule entitled in the king's name.

12. ATCHESON v. EVERITT. H. T. 1776. K. B. Cowp. 391.

Or an ac-
tion on pe-
nal sta-
tutes.

This was an action of debt upon the statute 2 Geo. 2. c. 24. s. 7. against bribery; the general issue was pleaded, and there was a verdict for the plaintiff. On behalf of the defendant it was moved that there might be a new trial, because a quaker had been received as a witness on his affirmation; and it was objected that this being a criminal case, his evidence ought not to have been admitted. The case was argued at great length, and the point fully considered. By the court. The stat. 7 & 8 W. 3. c. 34. which was made perpetual by stat. 1 Geo. 1. stat. 2. c. 6. allows a quaker to affirm in cases where other persons are required to take an oath, but it provides that their affirmation shall not be received in criminal causes. This, it was observed by *Lord Mansfield*, who delivered the judgment of the court, in some instances, bears hard upon the quakers, and leaves them in a worse condition than they were when their sect first arose; for, before the stat. 7 & 8 W. 3. c. 34. if a quaker were indicted for a capital offence, he might call quakers as witnesses in his defence, and that without an oath, for formerly the prisoner's witnesses were not sworn; but now, by stat. 1 Ann. stat. 2. c. 9. s. 3. all persons examined in criminal cases must be examined upon oath, both for and against the crown; therefore, if a quaker be indicted, he cannot have the benefit of a quaker testimony. The question is, therefore, whether the present is a criminal cause? If it is a criminal cause, he must be sworn, or he cannot give evidence. Now there is no distinction better known than the distinction between civil and criminal law, or between criminal prosecutions and civil actions. Mr. J. Blackstone, and all modern and ancient writers upon the subject, distinguish between them; penal actions were never yet put under the head of criminal law or crimes. The construction of the statute must be extended by equity to make this a criminal cause; it is as much a civil action as an action for money had and received. The legislature, when they ex-

*In the two cases last cited, the Court of King's Bench refused to grant an attachment for non-performance of an award on the affirmation of a quaker, because they said "it is a criminal prosecution within the proviso of the statute 7 & 8 W. 3. c. 34." But as the grounds on which the case was decided has since been questioned, the case itself may probably no longer be considered of any authority, especially since the cases *Powell v. Ward*, and *Taylor v. Scott*, above referred to. When the case of *Robins v. Seyward* was decided, an attachment for not performing an award was considered as a criminal proceeding in *R. v. Myers*, 1 T. R. 206. Mr. J. Buller, in answer to a case cited from 1 Atk. 58. to show that such an attachment was of a criminal nature, said, that case might have been good formerly, for then the Court only looked to the contempt; but it has been settled of late years, that an attachment for non-performance of an award is only in the nature of a civil execution. See *Rex v. Stokes*, Cowp. 136; *Bonafous v. Schoole*, 4 T. R. 316; *Rex v. Pickerrill*, ib. 809; and *M. Ilham v. Smith*, T. R. 86.

cepted the evidence of quakers in criminal causes, must be understood to mean causes technically criminal; and a different construction would not only be injurious to quakers, but prejudicial to the rest of the king's subjects, who may want their testimony. No authority whatever has been mentioned, nor any case cited, where it has been held that a penal action is a criminal case, and perhaps the point was never before doubted; the single authority mentioned against receiving the evidence of the quaker in this case, is an appeal of murder, 2 Str. 856. But that is only a different mode of prosecuting an offender to death; instead of proceeding by indictment in the usual manner, it allows the relation to carry on the prosecution for the purpose of attaining the same end which the king's prosecution would have had if the offender had been convicted, namely, execution; and therefore the writers on the law of England class an appeal of murder in the books, under the head of criminal cases. We are not under the least embarrassment in the present case; for there is not a single authority to prove that, upon a penal action, a quaker's evidence may not be received upon his affirmation, the judge did perfectly right in admitting this quaker to be a witness upon his affirmation, and consequently the rule for a new trial must be discharged. [442]

13. *IN RE GILLIBRAND, GENT. ONE, &c. H. T. 1822. K. B. 1 D. & R. 121.*

A motion was made for a rule calling on an attorney of the court to show cause why he should not answer the matters of an affidavit made on the affirmation of a quaker. *Per Cur.* It is doubtful whether the present application, if granted, could be supported. Where the object of the suit is to recover a debt, or to give to a party any legal right, the affirmation of a quaker is admissible. But where the object is criminal, though civil in form, (as in this case, to punish a person for misconduct) it cannot be received. Our present impression is, that it is inadmissible; but the party may take a rule nisi, although he must bear the expense of discussing the question, if the Court should be ultimately of opinion against him. A rule was taken out, but upon the defendant appearing to show cause, it was admitted that the matters of the affidavit were completely answered.—*Rule discharged.*

Qu. Whether the affirmation of a quaker is admissible to call upon an attorney of K. B. to answer the matters of an affidavit.

A bond to the African Company that a person appointed to the office of registrar at one of their settlements shall, whenever any person in the service of the company dies intestate, forthwith take under his care, and into his possession the goods, chattels, &c. of such person, & remit the same to the committee, or be paid to the lawful administrator, is valid.

Affirmative and Negative. See tit. *Evidence, Issue.*

Assay. See tit. *Assembly unlawful; Assault and Battery; Riot.*

Freightment. See tit. *Charity Party.*

African Company.

AFRICAN COMPANY V. TORRANE. H. T. 1796. K. B. 6 T. R. 588.

In debt on a bond, the defendant craved *oyer* of the condition, from which it appeared, after reciting "that the committee of the African Company had, at the request of the defendant, nominated him register at C. during their pleasure, under a certain salary," stated that "the defendant had agreed to take upon him the said office, and that in virtue thereof he would be entrusted with the possession, management, and sale of the property and effects of all persons dying intestate at the settlement, and with the remittance of the net proceeds thereof to the committee, in order to be by them paid over or delivered to the lawful administrator," was conditioned "to be void, if the defendant did not, as long as he continued in the office, take under his care and into his possession all and singular the goods, chattels, &c. of such person or persons, &c. &c." On demurrer and joinder in demurrer, two objections were taken; 1st. That the condition of the bond was illegal, inasmuch as it required the defendant to do acts which were illegal, and for doing which he would subject himself to actions. 2dly. That the performance of the condition would tend to lay a restraint on the African trade, contrary to the object and policy of the statutes relating thereto; but *Per Cur.* This bond is legal, as it was not intended that he should detain the effects of any person dying in that country intestate, against the rightful administrator, but merely that they should be deposited in a place of safe custody until they were claimed by those who were legally entitled to them.

- [443] **Age.** See tit. *Administration ; Attorney ; Baron and Feme ; Dower ; Executor and Administrator ; Infant.*

Agent. See tit. *Affidavit of Debt ; Attorney ; Insurance ; Principal & Agent.*

Agistment. See tit. *Bailment ; Lien ; Set-off ; Tithes.*

Agreement. See tit.

- Accord and Satisfaction, Account stated, Alien, Annuity, Apprenticeship, Arbitration, *Assumpsit*, Attorney, Auction and Auctioneer, Bail, Bailment, Bankrupt, Baron and Feme, Bills of Exchange and Promissory Notes, Bill of Lading, Bond, Bribery, Bridge, Building, Contract, Carrier, Charter Party, Chose in Actions, Composition with Creditors, Condition, Consignor and Consignee, Contract, Contribution, Copyright, Costs, Covenant, Debt, Debtor and Creditor, Deceit, Deed, Demurrage, Distress, East India Company, Escape, Estoppel, Executor and Administrator, Extortion, Ferry, Fixtures, Forbearance, Forestalling, Forgery, Fraud, Statute of, Freight, Game, Gaming, Gift, Goods sold, Guarantee, Heir, Indemnity, Infant, Innkeeper, Inns of Court, Insolvent Debtor, Insurance, Interest, Judgment, Jury, Landlord and Tenant, Land Tax, Lease, Legacy, Licence, Lien, Limitations, Statute of, Liquidated Damages, Lunatic, Marriage, Marriage Settlement, [444] Master and Servant, Misnomer, Money had and received, Money lent, Money paid, Mortgage, Navy, Nonjoinder, Nuisance, Papist, Parent and Child, Parties to Actions, Partners, Party-wall, Patent, Pawnbroker, Payment, Payment of Money into Court, Poor, Principal and Agent, Printer, Prize and Prize Money, Property Tax, Salvage, School, Set-off, Sheriff, Ship and Shipping, Slavery, Smuggling, Spirituous Liquors, Stamps, Statute, Stock, Stoppage in *Transitu*, Surety, Surgeon, Taxes, Theatre, Time, Tithes, Toll, Trees, Trust, Use and Occupation, Usury, Variance, Vender, and Purchaser, Wager, Warranty, Way, Witness.

Aid and Aid Prayer.—See 1 *Danc. Ab.* 259 ; 2 *Vin. Ab.* 165 ; 1 *Com. Dig.* 534 ; 2 *Wms. Saund.* 45. i.

1. LADY COBHAM, DEMANDANT, v. MATTHEW TOMLINSON, IN DOWER. T. T. 1671. C. P. T. Jones. 8.

Aid is not grantable after plea pleaded, or after a judgment of respondentia entered. After judgment, the tenant answered over ; and as to the parcel to which the joint tenancy was pleaded, he prayed in aid of his three daughters and others, showing that he himself was but tenant by the curtesy, as the reversion vested in his daughters, who were parceners with the other parties in aid, and set forth the whole matter. On a motion by the demandant that the plea of praying in aid should not be received, *Per Cur.* Aid is not demandable in a subsequent term after judgment to answer over ; 4 Hen. 6. c. 30 ; nor is it grantable after plea to the action, in case of a common person.

2. ONSLOW v. SMITH. E. T. 1801. C. P. 2 B. & P. 384.

- [445] A writ of right was brought in this case to recover a piece of ground. The If, after a general imparlance, a tenant in a writ of right prays in aid, it is good cause of demurrer. demandant counted and laid the right and seisin within sixty years, by taking the *espleis* in his father, from whom the right descended, to himself.* The tenant obtained three imparlances, and then prayed in aid,† to which the demandant demurred, upon the following grounds : 1st. That the tenant, in his plea of aid prayer, did not make *profert* of several indentures, which he alleged to have been made, with reference to whom the land in question belonged. 2d. That the tenant had prayed in aid in a term subsequent to that in which the demandant counted against the tenant, and even after an imparlance had been granted to him.

Per Cur. The first objection is of no avail, as it is unnecessary to make *profert* of any deed which has its operation under the statute of uses.‡ As to the second objection, the demurrer must be allowed. No dilatory plea can be pleaded in another term after a general imparlance. Aid prayer has been

* A writ of right cannot be maintained without showing an actual seisin by taking the *espleis* or profits of the land, either in the demandant himself, or the ancestor from whom he claims. *Dalby v. King*, 1 H. Bl. 1.

† It is a good counterplea to an aid prayer that the prayee has nothing in the reversion, (12 H. 6. J.) or that the prayer did not demise the land to the tenant. *Rast. Ent.* 27.

‡ See the cases collected on this subject, in *Wm. Saunders*, p. 9. a. in not. § 8 T. R. 573.

decided to be a dilatory plea,§ and cannot, therefore, under the present circumstances, be pleaded by the tenant. In 3 H. 6. 5. b. it was decided, that an indefinite number of aid prayers may be successively taken after an imparlance in the same term, but the tenant shall not have aid after a general imparlance in another term. The judgment of the Court is, therefore, that the tenant answer alone.

See *Booth on Real actions*, 61; *T. R.* 369; *Co. Ent.* 47. tit. *Annuities*, pl. 1; *Bro. Ab. tit. Ayde.* pl. 118; 8 *H.* 7. 11; 6 *Mod.* 28; 2 *Salk.* 498; 2 *Lord Raym.* 969; *Vin. Ab. tit. Aid of a Common Person, F. a. cites* 3 *H.* 656. c; 1 *Rol. Ab.* 185; *Hard.* 179; 2 *Leon.* 52; *Com. Dig. tit. Abatement.*||

3. *ONSLOW, DEMANDANT, v. SMITH, TENANT, E. T.* 1801. C. P. 2 B. & P. 384. Aid prayer—*Per Cur.* Aid prayer is a dilatory plea within the statute of Arne, and indeed the most dilatory plea that can be pleaded, since an infant in arms might be prayed in aid, and the parol would demur till the child come of age. It must be therefore verified by affidavit.

Aiders and Abettors.—See tit. *Burglary; Coventry Act; Embezzlement; Larceny.*

1. *COAL HEAVER'S CASE.* 1779. 1 *Leach.* 65; S. C. 2 *East. P. C.* 679. [446]
Per Cur. It has long been settled, that all who are present aiding when a felony is committed are principals in the second degree. See *Fost.* 347.

2. *THE KING v. MOORE.* 1784. 1 *Leach.* 314; S. C. 2 *East* 679.
The prisoner was indicted for stealing 20 guineas. The prosecutor was walking along the street when a stranger joined company with him, and after walking a little way in conversation together, the stranger suddenly stopped, and picked up a purse which was lying at a door. The stranger afterwards proposed that they should go and take some refreshment, and see what they had picked up. They accordingly went into a private room in an adjacent public house, where the stranger pulled out the purse, and from one end of it produced a receipt, signed W. S. for 200l. "for one diamond ring;" and from the other end he pulled out the ring itself. A conversation then ensued upon the subject of their good fortune, during which the prisoner entered the room, when the ring was shown to him, and after praising the beauty of its lustre, he offered to settle the division of its value. The stranger lamented that he had no money about him; upon which the prisoner asked the prosecutor if he had any. The prosecutor replied that he had 40 or 50 pounds at home, and the prisoner said that such a sum would just do. They all three then went to the prosecutor's lodgings at Chelsea, where the prosecutor got the money, and put down 20 guineas, which the stranger, in the presence of the prisoner took up; and in return, gave the prosecutor the ring, desiring that he would meet him at the same place on the next morning, and promising that he would then return the 20 guineas, and also give him 100 guineas for his share of the ring. It was also appointed that the prisoner should be there, and agreed that the prosecutor and the stranger should give him a guinea each for his trouble.

§ *Vide ante* p. 56.

|| When aid is granted, a judicial writ, called a *summoneas ad jurisgendum auxilium*, is sued out by the tenant, and if the prayee make two defaults, judgment is given that the tenant shall answer to the demandant without aid; *Booth.* 61. For the form of the *summoneas ad jurisgendum auxilium*, see 2 *Saund.* 45. n. 4; and for the form of the judgment, when the prayer in aid makes default, upon the return of the *alias summoneas ad jurisgendum auxilium*, see *Rast.* 27. a.

* But in order to render a person a principal in the second degree, or an aider or abettor, he must be present aiding and abetting at the fact, or ready to afford assistance necessary; but the presence need not to be a strict actual immediate presence, such a presence as would make him an eye or ear witness of what passes. So that if several persons set out together or in small parties, upon one common design, be it murder or other felony, or for any other purpose unlawful in itself, and each takes the part assigned him; some to commit the fact, others to watch at proper distances and stations to prevent a surprise, or to favor if, need be, the escape of those who are more immediately engaged; they are all, provided the fact be committed, in the eye of the law, present at it; for it was made a common cause with them, each man operated in his station at one and the same instant towards the same common end; and the part each man took tended to give countenance, encouragement, and protection, to the whole gang, and to ensure the success of their common enterprise. *Fost.* 350; 2 *Hawk P. C.* 29. s. 7. 8.

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If an act amounting to murder be committed in prosecution of some unlawful purpose, all persons accompanying the perpetrator of it to aid and assist him, are guilty of murder.

The appointment was not kept, and the ring of little or no value ; it was left with the jury to consider upon these facts, whether the prisoner and the stranger were not confederated together, for the purpose of obtaining money, on pretence of sharing the value of the ring, and whether he had not aided and assisted the stranger to obtain the money by the means which were used for that purpose. And the jury being of opinion in the affirmative, the case was submitted to the consideration of the judges, and they held that as the prisoner and his companion were acting in concert together, they were equally guilty.

3. DENTON AND CHAPPLE. Lent Assizes, 1697. cited *Fost.* 353.

Three soldiers went together to rob an orchard ; two got upon a pear tree, and the third stood at the gate with a drawn sword in his hand ; and the owner's son coming by, collared the man at the gate, and asked him what business he had there ; whereupon the soldier stabbed him. It was ruled to be murder in the man who stabbed, but that those on the tree were innocent. It was considered that they came to commit a small inconsiderable trespass, and that the man was killed upon a sudden affray without their knowledge. But that the decision would have been otherwise if they had all gone there with a general resolution against all opposers, for then the murder would have been committed in prosecution of their original purpose. See 1 *Hawk. P. C.* c. 29. § 7.

4. ANONYMOUS. At the Old Bailey Sessions, 1664. Cited by Lord Holt in *THE KING v. PLUMMER*. 12 Mod. 629 ; S. C. cited 1 *Leach*. 7. n. a.

The secretary of state made his warrant to apprehend divers suspected persons directed to the messengers ; the messengers having notice of their being in a particular house took several soldiers with them to assist them to apprehend the accused ; but took no civil officer with them ; neither did they make any demand to have the door opened, as they ought by law to do, but broke open the door ; and as soon as they had done this some of the soldiers commenced plundering, and stole away some goods ; and the question was, whether this was felony in them all. "That they were all," observed *Holt, C. J.* "engaged in an unlawful act, is plain, for they could not justify breaking a man's house without making a demand first ; yet in that case all those who were not guilty of the stealing were acquitted, notwithstanding their being engaged in one unlawful act of breaking the door ; and the reason was because they knew not of any such intent, but it was a chance opportunity of stealing, whereupon some of them did lay hands." See 1 *Leach*. 6 ; *Fost.* 353 ; *Rex v. Thompson, Keb.* 66 ; *Anon.* 8 Mod. 165.

5. PAGE AND HARWOOD'S CASE. H. T. 1670. K. B. Stiles. 86 ; S. C. Aleyn. 43. cited *Fost.* 355 ; 1 *Hale*. 468.

In a case upon the stat. 1 Jac. 1. c. 8. which enacts that every person who shall stab or thrust, &c. two persons were present aiding and abetting a third person, who in fact made the thrust and was denied the clergy ; and these persons, though agreed to have been principals in manslaughter at common law, were admitted to their clergy, for it was considered that though in judgment of law every one present and aiding is a principal, yet in construction of this statute which is so penal, it shall be extended only to such as really and actually made the thrust, not to those who in construction of law only may be said to make it. See *Evans v. French, Cro. Car.* 473 ; cited likewise by *Holt, C. J.* in *Whistler's case, Salk.* 542 ; 2 *Ld. Raym.* 842 ; *Observations on this case, Fost.* 356.

6. MIDWINTER AND SIMS'S CASE. *Fost.* App. 415.

The two prisoners, Midwinter and Sims, having conceived a prejudice against the prosecutor on account of a prosecution which he was then carrying on against them for stealing rabbits, agreed to take their revenge on him and to kill one of his breeding mares the same night ; and they executed their plan in the following manner : Midwinter, with the assistance of Sims, caught the mare, buckled his own girdle about her neck, and fastened a girdle of Sims's to his own ; and then Sims having taken hold of the girdle fixed in this manner to the mare's neck, held it fast, in order to prevent her from getting away, while Midwinter with a large sharp hook gave her a deep wound

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Semb. an aider and abettor in killing a mare indicted on the statute 9 Geo. I. c. 22. is ousted of

in the belly, of which she died the same night. Upon these facts, the judges decided, contrary to the opinion of *Foster, J.* that Sims was ousted of his clergy. *his cler- 87.**

7. *REX v. BAYNES & OTHERS.* Old Bailey. 1731. 1 Leach. C. L. 7; S. C. 2 East. 700.

On an indictment on the 8th Eliz. c. 4. for stealing bank notes,

Per Cur. As the statute upon which this indictment is framed, takes away the benefit of clergy, it must be construed strictly; consequently it only extends to *principals*, and not *aiders* and *abettors*, it being totally silent as to the latter. See *Murphy's case*, 1 Leach C. L. 266; *Sterne's case*, 1 Leach C. L. 473. *The stat. 8 Eliz. c. 4. does not extend to aiders and abettors.*

8. *THE QUEEN v. WHISTLER.* H. T. 1700. K. B. 7 Mod. 129; S. C. 2d Ld.

Raym. 842; S. C. 2 Salk. 542; S. C. 11 Mod. 25; S. C. Holt. 215.

On a conviction before a justice of peace on stat. 3 & 4 W. & M. c. 10. setting forth that the defendant was unlawfully and unjustly assistant to one Rolf, in killing five deer, by persuading him the said Rolf to hunt and kill the same, by lending him a dog to hunt and kill them, and a horse to bring them away, against the form of the statute; The question for the opinion of the Court was, whether the defendant was an aider and abettor therein, within the intent and meaning of the statute; and if the words aiding and abetting were not in the statute, whether the defendant would not be a principal. *A person who persuades another to kill deer, and lends him any thing for that purpose, is liable to the penalties of a statute made in terms against persons killing deer, or persons aiding and assisting therein.*

The judges gave their opinion at large on this point; and after the matter had been solemnly argued, it was adjudged by *Powell, Powis, and Gould, Justices*, against the opinion of *Holt, C. J.* that the defendant was guilty within the meaning of the statute; and judgment was entered against the defendant agreeable to their opinion. See 13 Hen. 7. c. 12; 2 Inst. 182; *Cro. Car.* 473; 2 Hale. P. C. 336; *Fost. C. L.* 130; *Y. B. 33 Edw. 1 fo. 11*; *Y. B. 5 H. 5. fo. 1*; *Y. B. 13 Hen. 7. 12. 13*; 11 Co. 37; 4 Burr. 2073.

Aire and Calder Navigation.

THE KING v. THE UNDERTAKERS OF THE AIRE AND CALDER NAVIGATION. M. T. 1788. K. B. 2 T. R. 660.

The Aire and Calder were made navigable by the stat. 10 & 11 W. 3. which was amended by a subsequent act of the 14 Geo. 3. c. 96. Under both these acts, the undertakers were entitled to receive certain toll for all goods carried upon the said rivers and cuts therein mentioned, according to the distance which such merchandize should be carried. The 14th section of the latter act provided, "that the rivers or any of the cuts under the authority of that act should not be subject or liable to the payment of any taxes, rates, or assessments, save and except such taxes, rates, and assessments, as had been and then were usually charged and assessed thereon." From 1752, the proprietors of the navigation had been invariably assessed for the taxes and duties to the maintenance of the poor in the town of Leeds, at the value of 600*l.* per annum; and they or their lessees had paid the assessment according to that value. They had, however, since been assessed at a higher rate; which increased assessment led to the present appeal from the sessions. To show the invalidity of the augmented rate, it was submitted that though the defendants could not insist upon the alleged custom, that there never had been a rate at more than 600*l.* per ann. as the whole matter arose within legal memory. Yet the fair construction of the act of parliament was, that they should not be assessed for a larger sum than they had been before its first enactment. [449] *The Aire and Calder navigation act prohibiting the imposition of any other kind of taxes, &c. not heretofore imposed, leaves the quantum discretionary, as prior to the enactment.*

Sed Per Cur. Consistently with a fair construction of the statute under consideration it might perhaps be decided that no other kind of rates than those which were assessed at the time the act was passed should be imposed; as, for instance, an highway-rate, or church-rate, or country-rate, had not been collected before, the legislature meant no such new rate should be im-

* Mr. J. Blackstone, in his Commentaries, vol. iv. 373 observes, That when the benefit of clergy is taken from the offence (as in case of murder, robbery, rape, and burglary), a principal in the second degree being present, aiding and abetting the crime, is as well excluded from his clergy as he that is principal in the first degree; but that where it is only taken away from the person committing the offence (as in the case of stabbing, or committing larceny in a dwelling-house, or privately from the person), his aider and abettors are not excluded through the tenderness of the law, which has determined that such statutes shall be taken literally.

posed in future ; but the quantum of the rates which had been imposed, must necessarily vary according to the exigencies of the case. For supposing at that time the land-tax had been at 2s. in the pound, it would be doing great violence to the words of the act of parliament to say that it never should be raised in any future exigency.

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Alderman.*

1. THE QUEEN v. ROGERS. T. T. 1700. K. B. 7 Mod. 28 ; S. C. 2 Ld. Raym. 777 ; S. C. 2 Salk. 426. S. C. Holt. 351.

It is not an indictable offence to speak contemptuously to an alderman of London while holding a wardmote, but the common sergent may file an information against the offender in the alderman's court.

A return was made to a *certiorari* "that if any citizen speaks contemptuous words of an alderman, or assaults him in the execution of his office, an information shall be exhibited against him in the name of the common sergent in the court of aldermen," and that they should proceed against him to fine him ; and that at a wardmote held by Sir R. J. the defendant assaulted him, and said "I have as much to do here as you ; you think sure you are among your *Bridewell birds*, but you are mistaken." For this conduct an information has been exhibited against him by the common sergent. *Per Cur.* It would have been doubtful if the offence had been by words only, because no indictment lies at common law, but he is to be bound to good behaviour ; yet for the assault he is punishable, and that may be by information there by custom, as well as in this court, though the regular course at common law is by indictment. And we are of opinion that the information lay in the court of aldermen, though an alderman was aggrieved ; otherwise of the mayor, for he is an integral part, without which the court cannot be held ; but the other may be severed, and he must not sit ; and the mayor and alderman may grant to an alderman, but the alderman and city cannot grant to a mayor. A custom to disfranchise for contemptuous words spoken of an alderman is void, according to 2 Lev. 200. A *procedendo* was granted. See 1 Sid. 62 ; 1 Mod. 35 ; 6 Mod. 124 ; 2 Lev. 200 ; 2 Jones. 229 ; 8 Co. 116 ; 4 Mod. 341 ; 3 Mod. 139 ; 1 Vent. 16 ; Cro. Jac. 58.

2. THE QUEEN v. DE LME. H. T. 1712. K. B. 10 Mod. 199.

In an information *quo warranto* against an alderman, the array may be challenged if returned by an alderman or a freeman.

This was an information against the defendant for exercising the office of alderman in the city of London, not being duly chosen. When the trial came on, the counsel for the queen challenged the array, because one of the sheriffs was one of those returned by the court of aldermen ; this challenge being allowed, a *venire facias* was directed to the other sheriff ; and then the counsel for the defendant challenged the array, because returned by a sheriff that was concerned in interest, as he was a freeman of the city of London : on this a *venire* was directed to the coroner. But before any return the counsel for the queen entered a suggestion on the record, setting forth that the question to be decided on this trial, being whether the right of election was in the freemen only, or in all those who paid scot and lot (freemen or not freemen,) it was evident, from the nature of the inquiry, that it was impossible for an impartial jury to be obtained from London, and therefore they prayed a *venire* to the sheriff of Surry, the adjacent county. The Court was moved to set aside this suggestion, as being out of time, and inconsistent with what the parties before admitted on the record ; but after hearing counsel on both sides the matter was adjourned. See Hob. 234 ; Cro. Jac. 35. 86 ; Doug. 465.

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3. FOOT v. PROWSE. E. T. 1724. K. B. 1 Stra. 625.

An alderman elected annually continues till another is chosen.

A mayor was to be elected from the aldermen, who are *annuatim eligendi*. It appeared that the aldermen present at the election had been in several

* The word "alderman," in a literal sense, imports no more than elder ; but in its ordinary and legal acceptation, it means one of the chief governors of the corporation or one of the assistants of the mayor or other head of corporate associations. Spelm. Gloss. 25 ; Madox. Firma Burgi, 14. In the city of London, and some other chartered places the alderman is a local magisterial officer, and he was formerly annually chosen, till by charter 28 Ed. 3. it was granted that they should not be removed without cause ; by the stat. 17 R. 2. c. 11. it was enacted that they should not be (vide stat. 11 Geo. 2. c. 8. or to their election) chosen annually, but remain till removed for cause. 4 Inst. 253 ; Kyd. 323 ; Latch. 231 ; Palm. 454. They are exempted from serving inferior offices, nor are they subject to be put in assize, or liable to be summoned as jurors. Cro. Eliz. 285 ; Latch. 231.

years, and had none of them been re-elected within a year. On a bill of exceptions, the Court was of opinion, that the election of the mayor was void for want of an annual election of the aldermen. But upon error in the Exchequer Chamber, and two solemn arguments, the judgment was reversed, and it was held that the words *annuatim eligendi* were only directory; and that an annual election of them was not necessary to make an election; and King, C. J. of C. P. who delivered the opinion of the Court, compared it to the case of a constable, and other annual officers, who are good officers, after the year is out, until another is elected and sworn. The reversal was affirmed in parliament. See *Swallow v. the City of London*, Sid. 287; the *King v. Brayfield*, 2 Keb. 488; the *King v. the Mayor, &c. of Doncaster*, 2 Lord Raym. 1564.

4. *KYNASTON v. THE MAYOR OF SHREWSBURY*. T. T. 1735. K. B. 2 Stra.

1051. Semb. S. C. T. T. 1735. 7 Mod. 201. S. P. *SHUTTLEWORTH v. THE CORPORATION OF LINCOLN*. 2 Bulst. 122. TAYLOR'S CASE, Poph. 133.

A *mandamus* to restore an alderman was granted without opposition.

A *mandamus* lies to restore an alderman.

5. *THE QUEEN v. THE MAYOR OF SHREWSBURY*. T. T. 1700. K. B. 10 Mod. 49; S. C. Fost. 283.

On a motion for a *mandamus* to be directed to the late lord mayor of the city of London, to return certain persons by name to the court of aldermen, as the person chosen by the wardmote of Broad-street. The mayor had, in fact, made a return, but a return of different persons (as to three of them) than what (the counsel said) appeared, on the scrutiny, to have been actually chosen. But after argument, the Court refused to grant a *mandamus*; observing that two things were to be considered: 1st. Whether it lies at all. 2d. Whether in this particular case it should be granted. That this Court has jurisdiction is beyond all legal controversy; but though it may have the power, yet it ought not to be exerted but where it is necessary; and if the court of aldermen are to choose one of the four elected by the wardmote, and not returned by the lord mayor, then it is clear that a *mandamus* cannot be necessary; for then it will be just the same thing, whether the persons chosen come before the court of aldermen by way of complaint, or by the return of the lord mayor in obedience to this *mandamus*. As this *mandamus* is unnecessary, so will it be ineffectual; for the end of it is only to bring the persons before the court of aldermen, which may be done as well by complaint of the persons injured. And after this *mandamus* granted, the aldermen must do just the same thing they are bound to do now upon complaint, viz. consider which are the persons really chosen by the wardmote. The darkness complained of in the scrutiny, only prevents that examination, which upon a complaint may be had. One difference there is between proceedings by complaint and *mandamus*, that the former is more compendious and less expensive. Now as to the persons that may be affected by this way of proceeding: to begin with the court of aldermen; they will be under the necessity of returning their own privileges to a *mandamus*, consequent of this now asked, or no means being left them to know which were truly chosen, of obeying the writ blindly, without knowing whether they do wrong or right. As for the mayor, if he obey the writ, he is subject to an action for a false return to the court of aldermen; and no instance yet has been produced where obedience to a mandatory writ of this court exposes a man to an action. If he return "*non electi*," he is liable to an action upon both returns. Actions have, indeed, been brought against an archdeacon for refusing, but never for paying obedience to a mandatory writ of this court. It has been objected there are some cases, wherein persons, by merely executing the process of the law, may become subject to actions, but surely, such a consequence is a very good reason for not giving way to an unprecedented process; unless otherwise, there would be a failure of justice. It has been objected that it is highly unreasonable for the same persons to be judges of the validity of the return, and to choose one of them too. We answer, it is unreasonable that they should be at liberty to take which four they please, but not at all that they may consider which of the

A *mandamus* will not lie to compel the returning officer to return the aldermen alleged to have been duly elected, but will leave the parties injured to bring an action.

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parties were really elected. It does by no means follow, that because they are the final electors, that therefore they are the proper judges to do right and judge which four were duly elected; and if they do wrong, then is the proper time for this Court to interpose, by granting a *mandamus*. Indeed it has been said that a *mandamus* will not lie in the first place to the court of aldermen, that the aldermen have no authority but upon the return of the lord mayor, and consequently that a *mandamus* to the court of aldermen can be of no use unless it be subsequent to the *mandamus* to the mayor; this objection supposes the court of aldermen concluded by the return of the lord mayor; and if this be so, then there is no way to let these persons into their right but by setting aside the return already made, which cannot be done by *mandamus*, but by action of *deceit*[†] only. Even in the case of a sheriff, where the return is into our own court, there is no way of doing it but by an action of *deceit*[†]; much less can it be done in the case of a return to a foreign court. If this be so, the *mandamus* will signify nothing, for the court of aldermen will be concluded by the first return. We were once considering whether a second return, made in obedience to a *mandamus* of this Court, might not vacate the former; but then we saw this inconvenience would still attend the court of aldermen being bound by the return, though this should be so, viz. that if a return should be made in the long vacation, then such a return, though a false one and evidently so, must yet conclude the court of aldermen, it being then impossible to apply for a *mandamus*. But another absurdity ensues from this opinion, viz. two conclusive returns. For if the last is not a conclusive return and the former is, this *mandamus* is vain; and if the first be not conclusive, why should the last? But this opinion is confuted by the bye law of Henry IV. which directs them to choose one of the four chosen not returned. In short, the way by complaint is a compendious one; that by *mandamus* long and intricate: for upon these two *mandamuses*, viz. that desired and the subsequent one to the court of aldermen, there may be contrary verdicts, which will leave it at last doubtful whether right is done or not.

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Alehouse.* See tit. *Carrier; Innkeeper; Tavern.*

At common law a licence was unnecessary.

But *sembr.* Keeping an alehouse without a licence is an indictable offence, notwithstanding a particular punishment is given by statute.

Qⁿ. if it be not only punishable by the stat.

4 Jac. 1. c. 4.

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1. *REX v. IVYES*. E. T. 1685. K. B. 2 Show. 468; S. C. Term. 135. S. C. FAULKNER'S CASE. E. T. 1668. K. B. 1 Saund. 249.

An indictment for keeping an alehouse without a licence, being removed into this court by *certiorari*; a motion was made for the purpose of having it quashed, on the ground that it was not an indictable offence by the 5 & 6 Ed. 6. c. 35. and that at common law no licence was required. The Court acquiesced in this opinion, and the indictment was accordingly quashed. See 1 Burr. 544; 6 Mod. 86; 2 Burr. 799; Hutt. 100; 7 Rep. 37; Sid. 64; 1 Lord Raym. 347; 4 Com. Dig. tit. Justice of the Peace, B. 25.

2. *REX v. MARRIOTT*. H. T. 1691. K. B. Carthew. 263.

Upon the defendant being convicted of keeping an unlicensed alehouse, a motion was made in arrest of judgment, on the ground that it was not an indictable offence, nor an offence at common law, but punishable by imprisonment and forfeiture, pursuant to the statutes 5 and 6 Edw. 6. c. 25; 3 Car. 1. c. 3; but Holt, C. J. An indictment being a summary mode of proceeding, is more beneficial than the statute, and is sustainable, though a particular punishment is inflicted by statute.

3. *STEPHEN WATSON'S CASE*. M. T. 1700. K. B. 3 Salk. 26; S. C. 1 Salk. 46. S. P. *REX v. EDWARDS*. M. T. 1700. K. B. 3 Salk. 27.

Stephen Watson was indicted at the Quarter Sessions, for having, without any licence from two justices of the peace, kept an alehouse against the peace, and against the form of the statute. On demurrer to this indictment, it was insisted, 1st. That an indictment would not lie in this case. 2d. That admitting it would lie, yet not at the sessions. 3d. But admitting that it would

* Every inn is not an alehouse, nor every alehouse an inn; but if an inn uses common-selling of ale, it is then also an alehouse: and if an alehouse lodges and entertains travellers, it is also an inn. Hutt. 99; Dalt. c. 56; 1 Burn. 30.

† It has been observed (1 Saund. 260, c. n. 5.) that this is not an indictable offence, the

lie, and at the sessions, yet this indictment was ill in form. *Per Cur.* 1st. This indictment must either be on stat. 5. & 6. Edw. 6. or on stat. 3 Car. 1. and both these acts prescribe another method of punishing this offence, which was created by one or other of them, and that method and no other must be followed; hence it follows that an indictment will not lie. 2d. But admitting that it is sustainable in general, yet not at the sessions, for this is not an indictment on stat. 4 Jac. 1. c. 1. for selling ale by the barrel without licence, for in that case, by the very words of the statute, an indictment will lie at the sessions; but this is an indictment on one of the statutes before-mentioned, and neither of them give the sessions any power in such case, and they have no power but what is expressly given them by the statute. 3d. This indictment is nothing in form; for the caption is, that it was presented by the oath of twelve men sworn and charged, without saying then and there sworn and charged. And subsequently it was adjudged that this indictment would not lie, because it was an offence created by the statute, and a particular method of punishing the offender was appointed by the statute, which should be followed and no other. See 4 Mod. 144; 6 id. 86; Com. 17; 1 Burr. 543; 2 Burr. 803.

4. *THE KING v. GIBBS*, M. T. 1722, K. B. 8 Mod. 58; S. C. 1 Stra. 497.

The defendant was indicted for selling beer without paying the duty, and found guilty. A motion was made in arrest of judgment, on two grounds: 1st. That the indictment was insufficient, because it set forth that the defendant sold beer without payment of the duty; but did not show to whom or at what time it was to be paid for, nor what quantity of beer he sold; and consequently a conviction on such an uncertain indictment, could not be pleaded to any other for the same offence, or could the defendant make any available defence to such an uncertain charge; and 2dly. That in criminal cases, the utmost certainty is required; therefore the quantity of the offence should have been set forth in the indictment, so as a conviction thereon might have been a bar to all other actions and prosecutions for the same offence; and for this reason the judgment was arrested, the Court holding the other not tenable.

5. *THE KING v. FORD*, T. T. 1722, K. B. 8 Mod. 175; S. C. 1 Stra. 555; S. C. Sess. Ca. 266.

The defendant was convicted on the statute 3 Car. 2. by which it is enacted, that none shall keep an alehouse with a licence, on pain of forfeiting 20s. to the poor, &c. A motion was made to quash this conviction, because alehouse keepers selling ale without a licence are punishable by former statutes, particularly by stat. 5 & 6 Ed. 6. viz. that none should keep alehouses without a licence, granted either in sessions or by two justices (one to be of the *quorum*), on pain of three days' imprisonment, without bail; and it was argued that it did not appear in this case but that the defendant might have been licenced by two justices of the peace, according to that statute; and if so, then this conviction ought to be quashed. *Per Cur.* The statute 5 & 6 Ed. 6. is entirely unconnected with the case, because it is alleged in the indictment that the defendant sold ale, contrary to stat. 3 Car.; and it being likewise averred that he sold it without any licence whatever, the objection that he might be licenced by two justices is of no weight.

6. *PARNHOUSE v. FORSTER*, M. T. 1697, K. B. 5 Mod. 427; S. C. 12 Mod. 254; 1 L. Raym. 479; S. C. Carth. 417; Salk. 387; S. C. Holt, 366.

By stat. 4 & 5 W. & M. entitled, "An Act for carrying on a War with France," it was enacted, "that constables should quarter soldiers on inkeepers, and such as kept alehouses and victualling houses, livery stables, or sold brandy, metheglin, or cider, by retail;" and in an action brought by the plaintiff presenting another specific mode of punishment; and this remark is in accordance with the modern practice. See an old precedent against husband and wife for keeping a tippling house, and the husband for being a common barrator, and the wife a common scold; West. 203; and another against a man for keeping a blind tavern without a sign, being a barrator, and his wife a scold; id. 207. The keeping an alehouse without licence was declared an offence by 5 & 6 Edw. 6. c. 23, and made punishable with confinement for three days and the finding sureties; this regulation was enforced by 1 Jac. 1. c. 9, and 4 Jac. 1. c. 4. and several more recent statutes have added pecuniary penalties. See 26 Geo. 2, c. 31, s. 9; 27 Geo. 2, c. 20, s. 3; 35 Geo. 3, c. 113; 38 Geo. 3, c. 54, s. 13.

Yet it has been held that an indictment for selling "divers quantity of ale," is too general;

Or need not aver that he was not licenced according to 5 & 6 Ed. 6. c. 25. [455]

Letting lodgings and providing the lodgers with ale &c. stable room, and horse meat at a certain price per day, is not an alehouse

within the
meaning of
the statutes.

[456]

An ale-
house licen-
sed by two
justices*

cannot be
suppressed
by the ses-
sions unless
it be a dis-
orderly
house.

If an order
of sessions
for suppress-
ing an ale-
house have
only the
county in
the margin
it will be
quashed.

tiff against a constable for quartering a horse and dragoon on him, he pleaded not guilty, and gave the statute in evidence, and the jury found that there were medicinal wells at Epsom, and that the plaintiff, during the season for drinking the waters, indefinitely let lodgings to such as went thither to drink the waters, for the air, or for their pleasure, and dressed victuals for them, and sold them ale and beer, and entertained their horse at 8d. *per diem*, but sold no victuals, drink, &c. to any but to his lodgers, and thus the plaintiff had no licence from any justices of the peace to sell ale, and that the defendant billeted a soldier and a horse on the plaintiff, who compelled him to find victuals for himself, and provision for his horse, for the space of two months; and if, &c. *Per Cur.* The plaintiff's house is not within the statute; 1st. It is no inn, for the verdict finds he let lodgings, only which shows him not compellable to entertain any individual, and none could come there without a previous contract. 2dly. It is not an alehouse or victualling house, for those extend only to such alehouses or victualling houses as are known and described by several acts of parliament, which it is an offence to keep without a licence, and it must be a common tavern wherein drink, &c. is commonly sold to all the king's subjects. 3dly. It was resolved to be a statute against the liberty of the subject, for before it was passed no man was obliged to entertain soldiers against his will, which appears by the petition of right, 2 Car. 2. and by stat. 21 Car. 2. and therefore not to be construed favourably without great necessity. 4thly. That in this case, the constable, having wrongfully quartered the dragoon on him, was answerable for all the loss the plaintiff had sustained.—Judgment for the plaintiff. See 8 Mod. 877; Hutton. 200; Latch. 88; Dyer, 266; Moor 877; Ra. Ent. 405; Cro. Eliz. 622. 398; Cro. Jac. 224; 3 Bac. Ab. 183; 2 Roll. Ab. 84; 1 Show. 268; Palm. 367; 8 Co. 32. 290; 4 Co. 123; Kely. 50; Godb. 345; 3 Wils. 409, 4 Burr. 2065; Dalton, J. 32; 1 T. R. 572; 1 Salk. 110; 3 B. & A. 283; 2 Chit. Rep. 484.

7. *REX V. RANDALL*, M. T. 1700, K. B. 2 Salk. 470; S. C. Holt, 405; S. C. 2 Salk. 27.

Two orders, made at the sessions in Middlesex, were removed by *certiorari*; the first recited, that R. R. had lately taken a house at H. designing to sell ale and beer there, and that the house had never been inhabited by other persons than merchants, &c. and there were alehouses enough in H. already, therefore it is ordered that no licence be granted to any house there wherein ale was not formerly sold; and that no licence should be given to R. The other order recited that a licence had been surreptitiously obtained by R. from two justices to sell ale there, &c.; that yet he should be suppressed, &c. from drawing ale, &c. And now the Court was moved to quash these orders, because, by stat. 5 & 6 Ed. 6. the quarter sessions cannot controul the authority of two justices in this manner. *Per Cur.* The question is, whether the sessions can suppress an alehouse licenced by two justices of the peace, unless on the ground of the house being disorderly, and we are clearly of opinion that they cannot.—Order quashed.

8. *THE KING V. AUSTIN*, M. T. 1724, K. B. 8 Mod. 309; S. C. Forts. 325.

An order of sessions was made to hinder the defendant from selling ale, and the following exceptions were taken to it; 1st. It did not appear by the order that it was a common alehouse; every alehouse not being necessarily a common alehouse. 2dly. It did not appear that the defendant was summoned, or present when the order was made. 3dly. The county is only in the

* By stat. 5 & 6 Edw. 6. c. 25, any two justices (1 Q.) might licence alehouses, but now by statutes 2 Geo. 2. c. 28, s. 11, and 26 Geo. 2. c. 81, s. 4. reciting, that whereas many inconveniences have arisen from persons being licenced to keep inns and common alehouses by justices of the peace, who living remote from the places of abode of such persons, may not be truly informed as to the occasion or want of such inns or common alehouses, or the character of the persons applying for licences to keep the same, it is enacted, that after the 24th of June, 1729, no licence shall be granted to any person to keep a common inn or alehouse, or to retail any brandy or strong water, but at a general meeting of the peace, acting in the division where the said person dwells, to be holden for that purpose on the first day of September yearly, or within twenty days after. Sect. 12 provides that nothing in this act shall extend to alter the method or power of granting licences in any city or

margin, and not in the body of the order; so that it does not appear in what county the alehouse is, which is necessary to confer jurisdiction on the justices. Pratt, C. J. There is no difference between an alehouse and a common alehouse. If a house be suppressed for any disorder or offence committed by the party, he ought to be summoned; otherwise, when it is suppressed by the discretionary power of the justices. The third objection is fatal. In all criminal prosecutions it is not sufficient to put the county in the margin, for that can only prove that the fact was committed in that county. There is no difference between indictments and orders (King v. Marshall, Trinity, 10 Geo.) and this must be deemed a criminal prosecution. The order was quashed for the third exception. See 1 Chit. Crim. Law, 194.

9. THE KING v. VENABLES, T. T. 1724, K. B. 8 Mod. 377; S. C. Forts, [457] 325; 2 Lord Raym. 1405; S. C. 1 Stra. 360.

An objection was made in this case to an order for suppressing an alehouse, on the ground that there ought to be a summons. But the Court, after argument, held that it was unnecessary to set out the summons in the order, though it might be proper that such a preliminary notice should be given. See The Queen v. Dyer, Salk. 18. But it is unnecessary to set out the summons.

10. REX v. DR. DRAKE AND ANOTHER, H. T. 1816, K. B. cited 1 Burn. Just. 41. To author

An individual cannot keep a public house and sell ale and spiritous liquors without two licenses; first, a magistrate's licence, under stat. 48 Geo. 3, c. 143, and secondly, an excise licence. Neither is operative alone; both together they become so. Without the magistrate's warrant, the public house cannot be opened; without the excise licence, even when opened, no excisable liquors can be legally sold. The penalty for not having the former is under the 35 Geo. 3, c. 113; the latter under 48 Geo. 3, c. 143, s. 5. See Rex v. Downes, 3 T. R. 560. ize the sale of ale and spiritous liquors two licences are necessary; a magistrate's licence, and an excise licence.

REX v. ATHAY, M. T. 1758, K. B. 2 Burr, 653.

On showing cause why a rule should not be made absolute for an information against a justice for a misdemeanour in refusing to grant a licence to one Francis Simes (who had been licensed for several preceding years) to sell ale as usual, it appeared that one of the grounds upon which this rule had been obtained was, that the only reason why the licence had been refused to the applicant was, his declining to pay a sum of money, (viz. 5*l.*) which was claimed of him upon a distinct and collateral account, and which he denied to be due from him, the payment of which sum of money was, as he alleged, insisted upon by the justice, as a condition precedent to his granting the licence. The Court were unanimous (the latter allegation appeared to be false in fact) and declared explicitly that the justices had no sort of authority to annex any such conditions to the grant of these licenses. The justices have no authority to annex conditions to the grant of ale licences

12. JOHN GILES'S CASE, M. T. 1730, K. B. 2 Stra. 831; S. P. Rex v. NOTTINGHAM, Say. Rep. 217.

A motion was made for a *mandamus* to the justices of the city of Worcester to grant a licence to Giles to keep an alehouse, insisting that it being within a city, the 2 Geo. 2, c. 28, did not extend to it. On the other side it was argued that it was discretionary in the justices, and cited Salk, 45, that no appeal lies for the denial of a licence; and if the owner be committed, the want of a licence can only come in question, and not the reason why it was denied. *Per Cur.* There never was an instance of such *mandamus*, and therefore we will not grant it. See 1 Barnard, 402; 4 B. & A. 293; 1 Chit. Rep. 34; 2 Selw. N. P. 1047. A mandamus to compel justices to grant a licence can not be obtained;

13. REX v. YOUNG AND PITTS, E. T. 1757, K. B. 1 Burr. 557. [458]

A motion was made for an information against the defendants for arbitrarily and unreasonably refusing to grant a licence to one Henry Day, to keep an inn at Eversley, Wilts. Lord Mansfield, C. J. declared, "That the Court of K. B. has no power or claim to review the reasons of the justices of the peace, upon which they form their judgments in granting licences, by way of appeal from their judgments, or overruling the discretion intrusted town corporate. See 48 G. 3, c. 143, s. 8, 4; 53 G. 3, c. 103; 56 G. 3, c. 113; 59 G. 3, c. 9, s. 52. Or an information for a mere error in judgment.

to them. But if it clearly appears that the justices have been partially, maliciously, or corruptly influenced in the exercise of this discretion, and have consequently abused the trust reposed in them, they are liable to prosecution by indictment or information, or even, possibly, by action, if the malice be very gross and injurious. If their judgment be wrong, yet their heart and intention pure, God forbid they should be punished." And he declared that he should always lean towards favouring them, unless partiality, corruption, or malice, clearly appeared; and having gone through all the particulars, both of the charge and of the defence, he concluded with declaring it as his opinion that there was not sufficient ground for a criminal charge against these justices. Denison, C. J. said, "It must be clear and apparent partiality, or wilful misbehaviour, to induce the Court to grant an information, not a mere error in judgment." And the Court unanimously discharged the rule with costs.

14. *REX V. WILLIAMS AND DAVIS*, E. T. 1762, K. B. 3 Burr, 1317. S. P.

REX V. HANN AND PRICE, T. T. 1716, K. B. 3 Burr, 1716.

But if gross corruption can be shown, an information will be granted.

An information was granted against the defendants, justices of the peace for the borough of Penryn, for refusing to grant licences to those alehouse keepers who voted against their recommendation of candidates for members of parliament for that borough. It appeared that they had acted very grossly, having previously threatened to ruin the applicants by not granting them licenses, in case they should vote against those candidates whose interest the judges themselves espoused, and having afterwards actually refused them licenses on that account only; and Lord Mansfield declared, that the Court granted this information against the justices, not for the mere refusal to grant the licences (which they had a discretion to grant or refuse as they should seem to be right and proper), but for the corrupt motive of such refusal, for their oppressive and unjust conduct in refusing to grant them, because the persons applying for them would not give their votes for members of parliament as the justices had dictated.

15. *REX V. HOLLAND AND FORSTER*, E. T. 1787, K. B. 1 T. R. 692. S. P.

REX V. BINGHAM, CLERK, M. T. 1813, K. B. Printed Report by Gurney, 1814. S. P. *REX V. SAINSBURY*, M. T. 1791, K. B. 4 T. R. 457.

Or for improperly granting an ale licence.

[459]

An information had been moved for against the defendants for improperly granting an ale licence to one H. who had been refused one by the justices at their last general meeting, on account of misbehaviour. The defendant Forster had been present at that general meeting at the time when the licence was refused; but he afterwards told the other defendant Holland, who was not present at the general meeting, that the only reason why a licence had not been granted then was, that they might have an opportunity of inquiring into the character of H. and he accordingly prevailed on Holland, at a private meeting held by those two only, to join in granting a licence. The Court were clearly of opinion that an information should be granted against a justice, as well for granting a licence improperly, as for refusing one without cause. That the only ground of these applications was the improper conduct of the magistrates; but as it appeared in this case that Holland, though not altogether blameless, had been deceived by Forster, they discharged the rule as to the former, upon his paying the costs of the application as against himself, and as to the latter they granted the information. See 1 Russel on Crimes, 215.

16. *THE KING V. MARSHALL AND GRANTHAM*, H. T. 1811, K. B. 13 East, 222.

But the information cannot be obtained so late in the second term after the grievance as to prevent the magistrate from showing cause against the rule in the same term; Though it may be moved for in the second term after the offence, there being no intervening assizes.

A motion was made for a criminal information against two justices of the peace for having, on the 24th of October last, improperly granted an ale licence. The applicant had given the defendants notice of the intended motion on the 26th January; but the Court refused to entertain it, because it was made so late in the second term (H. T. 9th February) that the magistrates would have no opportunity of showing cause in the present term against a rule nisi for an information if granted.

See 7 T. R. 80; *Loft*. 394; *Hand. Prac.* 6; 1 *Chit. Crim. Law* 875.

17. *THE KING V. HERRIES AND ANOTHER*, H. T. 1811, K. B. 13 East, 270; S.

P. REX V. ST. AUBYN AND ANOTHER, H. T. 1805, K. B. cited 13 East, 270, n.

A motion was made for leave to file an information against two justices of the peace for the county of Salop, upon a charge of having improperly re-

fused an ale licence; but after stating that the refusal was in September last, the counsel doubted whether this application was made in time, but this being the second term after the fact complained of; and subsequently Lord Ellenborough, C. J. stated, that upon an accurate review and consideration of the precedents and practice, the counsel was now in time to move for the information within the second term, no assizes having intervened.

18. *REX v. HANN AND PRICE*, M. T. 1765, K. B. 3 Burr. 1786.

It was moved on behalf of the defendants, who had confessed themselves guilty of an information for refusing a licence to a public-house, for a rule to dispense with the personal appearance of the defendants, on the undertaking of their clerk in court "to answer for their fines;" and the Court laid down this general doctrine, viz. that though such a motion was subject to the discretion of the Court, either to grant or to refuse it, where it was clear and certain that the punishment would not be corporal, yet it ought to be denied in every case where it was either probable or possible that the punishment would be corporal; and though the Court did not then declare what punishment they would inflict upon the present defendants, yet they saw the offence in so atrocious a light, as to be far from determining "that it would be only pecuniary." And Wilmot, J. and Aston, J. thought that even where the punishment would most probably only be pecuniary, yet, in offences of a very gross and public nature, the persons convicted should appear in person, for the sake of example, and with the view of preventing like offences from being committed by other persons, as the notoriety of their being called up to answer criminally for such offences would very much conduce to deter others venturing to commit similar transgressions.

19. *BASSETT v. GODSCHALL, AND OTHERS*, T. T. 1769, C. P. 3 Wils. 121.

General demurrer to an action of trespass on the case, brought against the justices for refusing a licence to an alehouse-keeper. *Per Cur.* The legislature has intrusted the justices of the peace with a discretionary power, to grant or refuse licences for keeping inns and alehouses; if they abuse that power, or misbehave themselves in the execution of their office or authority, they are answerable criminally, by way of information in B. R. We do not think that a justice of peace is answerable in an action to every individual who asks him for a licence to keep an inn or alehouse, and he refuses to grant one; if he were so, there would be an end to the commission of the peace; for no man would act therein; indeed he is answerable to the public if he misbehaves himself, and wilfully, knowingly, and maliciously, injures and oppresses the king's subjects, under colour of his office, and contrary to law; but he cannot be answerable to every individual touching the matter in question in an action. Every plaintiff in an action must have an antecedent right to bring it; the plaintiff here has no right to have a licence, unless the justices think proper to grant it, therefore he can have no right of action against the justices for refusing it.

20. *REX v. DOVE*, E. T. 1820, K. B. 3 B. & A. 596.

A conviction had been made upon the oath of one credible witness against the defendant, who was an alehouse-keeper, for permitting several persons, named in the conviction, to remain drinking and tippling in his alehouse, between the hours of eleven and twelve o'clock, contrary to the form of the statute. On a *certiorari* being obtained to remove it, it was objected that the conviction did not state whether the persons, who were suffered by the defendant to tipple in his alehouse, were inhabitants of the place or strangers; as in the latter case the stat. 1 Car. c. 4. must have been the act upon which the conviction was founded, which requires the conviction to be on the oath of two credible witnesses.

Per Cur. To decide the present question we must have reference to the different acts of parliament; it depends upon the construction of three different acts, 1 Jac. 9; 21 Jac. c. 7; 1 Car. c. 4. By the first, an innkeeper, under circumstances similar to the present, could be convicted on the oath of two witnesses, if the party was an inhabitant. The 21 Jac. c. 7. however, made one witness sufficient; but in other respects re-enacted and made per-

The defendant upon such an information, must appear personally to receive judgment.

No action lies against justices for refusing to grant a licence.

The 21 Jac. c. 7. allows an alehouse-keeper, suffering inhabitants of the parish to tipple, to be convicted on the oath of one witness; and the 1 Car. c. 4.

extends the same penalty to the case of strangers, but requires the proof by two witnesses. A conviction against an alehouse-keeper, stated to be on the oath of one witness for allowing persons to tipple in

his ale-house, was therefore holden to be insufficient for not showing whether those persons were inhabitants or strangers

[461] An appeal does not lie to the sessions from a conviction for selling beer without an excise licence, under 48 G 3, c. 143, s. 5.

An *alias dictus*, improperly stated is no ground for arresting the judgment. *Semb.* that a variance in the *alias dictus*, between the issue and *nisi prius* record is immaterial. The *alias dictus* should be placed after the addition of the defendant, and if inserted before the indictment will be quashed.

[462] But such an irregularity is cured by the defendant pleading over. A plea to an indictment with an *alias dictus*, must be demurred to,

petual the provisions in 1 Jac. c. 9. Afterwards 1 Car. c. 4. was passed providing "that an alehouse-keeper, permitting a stranger to tipple, shall incur the same penalty, and in the same manner to be proved, &c. as in the former statute of the first year of his late majesty's reign." It has been contended that the 1 Car. c. 4. referred to the 1 Jac. c. 4. as altered by the 21 Jac. c. 7. in which case the conviction upon the oath of one witness would be equally good, whether the person tippled with inhabitants or strangers; we do not however, think that a proper construction. The legislature had in view both the statutes, for they are both distinctly referred to; and the safe way is, therefore, in cases of this sort, to abide by the strict words of the act. The conviction must be quashed for uncertainty. Conviction quashed.

21. *REX v. HANSON*, E. T. 1821, K. B. 4 B. & A. 519.

The defendant had been convicted in the penalty of 50*l.* by two justices for having sold beer and ale without an excise licence, under 48 Geo. 3, c. 143; s. 5. The conviction was, however, quashed, upon an appeal to the next sessions; upon which the proceedings were removed into this court by *certiorari*. A rule nisi had been obtained to quash the order of the sessions, upon the ground that no appeal lay to the sessions from the conviction in this case.

Per Cur. The rule of law is, that although a *certiorari* lies, unless expressly taken away, yet an appeal does not lie unless expressly given by statute. The 48 Geo. 3, c. 143, gives no appeal; the order of sessions must be therefore quashed.—Rule absolute. See 2 T. R. 504; 6 East, 514.

Alias dictus.

1. *CHURCH v. JASON*, T. T. 1732, C. P. Ca. Prac. 91, S. C. Reg. 322.

On a verdict for the plaintiff in an action of debt on bond, a motion was made in arrest of judgment on the ground that the *alias dictus* was in latin, when, according to a late act of parliament, it should be in English.

Per Cur. These words signify nothing, and will not invalidate a good declaration; they are quite superfluous, and are merely descriptive of the bond. See *Holmes v. Holmes*, Prac. Reg. 413.

2. *HOLMES v. HOLMES*, E. T. 1732, C. P. Prac. Reg. 413.

To an action of debt on bond the defendant pleaded *non est factum*; and, after verdict a motion was made to set it aside on the ground of a variance between the issue delivered, and the *nisi prius* record, in the *alias dict'*, viz. *de Oldaxenhorpe*, instead of *Oldoxenliohope*; and the Chief Justice and Fortesque, J. thought it material as to the issue; but Reeve J. thought it immaterial; and, after argument, the Court discharged the rule.

3. *REX v. MAJOR SEMPLÉ*, Old Bailey, 1786, 1 Leach, C. J. 420.

Prior to pleading to an indictment for larceny, an exception was taken, on the ground that the indictment was informal, the *alias dictus* being placed before the addition, and not after the first name; and the Court, adopting this opinion, quashed the indictment. See 2 Hawk, P. C. c. 25, s. 470.

4. *HANNAM'S CASE*, Old Bailey, 1787, 1 Leach, 420, note.

The defendant, after having pleaded to an indictment, objected thereto that the *alias dictus* had been placed before the addition instead of after the first name; but the Court overruled the objection, observing that the prisoner had aided the defect by pleading over to the merits of the indictment.

5. *REX v. CLARK*, H. T. 1822, 1 D. & R. 43.

To an indictment by the name of John Jones, alias George Clark, the defendant pleaded in abatement that he was never called or known by the name of George Clark; but that he had been always called and known by the name of John Jones. A motion was made for a rule to show cause why the plea should not be quashed, and the defendant required to plead in chief.

Per Cur. The defendant has a right to plead in abatement, that the name by which he is indicted is not his right name. As this plea does not amount to the general issue, the prosecutor must demur to it, and cannot quash it on motion.—Rule refused. See Com. Dig. tit. Pleader, E. 14; Hob. 127; 1 Leon 178.

Alien.* See also tit. Alien Enemy; Naturalization and Denization.

and cannot
be quashed
on motion.

I. WHO ARE CONSIDERED AS, p. 463.

II. RIGHTS AND INCAPACITIES OF, p. 464.

III. RIGHTS AND INCAPACITIES OF THIRD PARTIES CONNECTED WITH, p. 469.

* Alien is derived from the Latin word *alienus*, and according to its etymology, signifies a person born out of the allegiance of the king; Co. Litt. 1286; Lit. Sect. 198; Calvin's case 7 Co. 66; and if the party be born in a place not then actually possessed either by the king himself or by some prince subject to him, and doing him homage, but which, after the birth, comes within his allegiance, he continues an alien, notwithstanding the change; or if the king of England make a conquest, the persons there born are his subjects; but if it be reconquered, persons born there afterwards are aliens. No one is an alien whose parents, at the time of their birth, are under the actual obedience of our king, and whose place of birth is within his dominions; 7 Co. 18; Vaugh. 279; and the children of ambassadors, born of English parents in a place out of the king's allegiance, were not alien even at common law; 7 Co. 18, a; and by the stat. 25 Ed. 3, it is declared that the children of the king, wherever born, may inherit; the same statute enables children born abroad to inherit, if, at their birth, both the parents are within the king's allegiance, and their mothers pass the sea with the licence of their husbands; Cro. Car. 601; and by the statute 7 Ann. c. 5, s. 3, it is enacted, that the children of all natural born subjects, born out of the allegiance of her majesty, her heirs and successors, shall be deemed, judged, and taken to be natural born subjects of this kingdom, to all intents, constructions, and purposes whatsoever. By the 7 Ann. c. 5, s. 3, the above clause is confirmed with the following proviso: that it shall not extend to any children, so as to make them natural born subjects of Great Britain, whose fathers, at the time of the birth of such children respectively, were or shall be attainted of high treason, by judgment, outlawry, or otherwise, either in this kingdom or in Ireland, or whose fathers, at the time of the birth of such children respectively, by any law or laws made in this kingdom or in Ireland, were or shall be liable to the penalties of high treason or felony, in case of their returning into this kingdom or into Ireland without the licence of his majesty, his heirs or successors, or any of his majesty's royal predecessors, or whose fathers, at the time of the birth of such children respectively, were or shall be in the actual service of any foreign prince or state, then in enmity with the crown of England; but that all such children are, were, and shall be and remain in the same state, plight, and condition, to all intents, constructions, and purposes whatsoever, as they would have been in if the said act of the 7th year of her said late majesty's reign, or this present act, had never been made; but out of this proviso are excepted (other than the children of such persons who went out to Ireland in pursuance of the articles of Limerick) the child of every such person before described, who, at any time between the 16th day of November, 1708, and the 25th day of March, 1781, hath come into Great Britain or Ireland, and hath continued to reside in any of those places for the space of two years, and during such residence hath professed the protestant religion; also every child whose father came into Great Britain or Ireland, &c. and professed the protestant religion, and died there between the times aforesaid; also every child whose father continued in the actual possession or receipt of the rents and profits of any lands, &c. for the space of one whole year, at any time between the aforesaid times, or hath *bona fide*, and for valuable consideration, sold, conveyed, or settled any lands, &c. in Great Britain or Ireland, and any person claiming title thereto under such sale, &c. who hath been or continued in the actual possession or receipt of the rents and profits thereof, for the space of six months, between the times aforesaid, &c.

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By the 13 Geo. 3, c. 21, the provisions of the above acts are extended to grandchildren, still, however, adhering to the paternal line, with provisions that nothing in that act shall be construed to affect any of the limitations or restrictions of the act of 4 Geo. 2, c. 21, or to repeal or alter the act of 5 Geo. 1, c. 27, hereafter mentioned, or to repeal or alter any law or custom concerning aliens' duty, customs, and impositions, or to cause any privilege, exemption, or abatement, relating thereto, in favor of any person naturalized by virtue of that act; unless such person shall come into this realm, and there inhabit and reside, and shall take and subscribe the oaths, and make, repeat, and subscribe the declaration appointed by the act of 1 Geo. 1, c. 13, entitled, "An Act for further Security," &c. at the places and times and in the manner directed by that act, and also receive the sacrament of the Lord's Supper, according to the usage of the church of England, or in some protestant or reformed congregation, within the kingdom of Great Britain, within three months before his taking the oaths in the said act mentioned, and shall, at the time and place of such oaths, and of making, and repeating, and subscribing the said declaration, produce a certificate signed by the person administering the said sacrament, and signed by two credible witnesses, whereof an entry shall be made of record in the court and courts respectively, wherein such oaths shall have been made and subscribed, without any fee or reward. And it is further provided; that no person shall be by this act enabled to defeat any estate, right, or interest, which, on the last day of that session, should he had or vested in any other person, or to claim or demand any estate or interest which shall hereafter accrue, so as such claim or demand shall be made within five years after the same shall accrue.

By stat. 14 and 15 Hen. 8, c. 4, it is enacted, that if an English subject go beyond the

If an alien has issue by an English woman out of the king's lineage the issue shall be alien, tho' she be a natural subject.

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A devise to the heir of an alien is void unless the former has been naturalized by act of parliament; but if an alien has two sons born in England, tho' they cannot inherit their father, still one may inherit the other.

I. WHO ARE CONSIDERED AS.

COLLINGWOOD v. PACE, H. T. 1669, K. B. 1 Vent. 492.

Per Hale, C. J. It is without question that if an English woman go beyond the seas, and marry an alien, and have issue born beyond the seas, the issue are aliens, for the wife was *sub potestate viri*, and yet the issue born in England should inherit, though the husband be an alien. See Cro. Car. 602; 1 Sid. 198; 1 Vent. 427-8.

II. RIGHTS AND INCAPACITIES OF.*

1. COLLINGWOOD v. PACE, H. T. 1666, C. P. 1 Lev. 59; S. C. 1 Vent. 413.

Upon a special verdict, found in an action on ejectment, it appeared that one R. an alien Scot before the union, had four sons, viz. R. N. J. and G. seas, and there become a sworn subject to any foreign prince or state, he shall, during his residence abroad, pay such impositions as aliens do with a proviso, that if he returns and lives here, he shall be restored to his liberties and privileges. By statute 13 Geo. 2, c. 8, every foreign seaman who shall have served during the time of war on board any king's ship, or any trading ship or privateer belonging to subjects of Great Britain for two years, pursuant to the king's proclamation, shall be deemed a natural born subject. 2. By stat. 22 Geo. 2, c. 45, every foreign protestant, who shall serve three years on board any ship (fitted out as directed by the 6 Geo. 2, c. 83, or by this act) employed in the whale fishery in the Greenland seas or Davis' Straights, and who shall take the oaths, &c. contained in the 1 Geo. 1, st. 2, c. 13, and receive the sacrament, as appointed by this act, shall be deemed a natural born subject. 3. But this act excludes these who are excepted by the 7 Ann. c. 5, s. 3. 4. And both these acts contain the same exceptions and restrictions as the 12 & 13 W. 3, s. 2. 4. By stat. 13 Geo. 2, c. 7, as amended by 20 Geo. 2, c. 44, all persons out of the allegiance of the king, upon their residing seven years in any of the American colonies, without being absent more than two months at a time, and upon taking the oaths contained in 1 Geo. 1, stat. 2, c. 13, (or if quakers or other protestants, who conscientiously scruple the taking an oath, upon their making such declarations or affirmations to the same effect as prescribed by 8 Geo. 1, c. 6, before the chief judge or other judge of such colony, are to be deemed natural born subjects of Great Britain. 5. But all such foreign protestants (except quakers) are further required to receive the sacrament in some reformed or protestant church in Great Britain, or in some one of the colonies, within three months before taking such oaths, &c. and at the time of taking the oaths, to produce a certificate thereof, signed by the person administering the sacrament, and attested by two witnesses. 6. And with respect to Jews, they, as well as quakers, are exempt by 13 Geo. 2, c. 7, s. 1, from taking the sacrament. 7. And whenever any Jew shall present himself to take the oath of abjuration, in pursuance of this act, the words "upon the true faith of a christian," shall be omitted. 8. By stat. 2 Geo. 3, c. 25, all foreign protestants serving in the Royal American Regiment, or as engineers in America for two years, who shall take the oaths appointed by 1 Geo. 1, st. 2, c. 13, and shall at the time produce certificates of their having received the sacrament in some protestant and reformed congregation within six months before, shall be deemed to be natural subjects of Great Britain. 9. These acts also exclude those who are excepted by stat. 7 Ann. c. 5, s. 3, and contain the same restrictions 12 & 13 W. 3, c. 2, 10. But by st. 13 Geo. 7, c. 25, every person that shall become a natural born subject by virtue of the 13 Geo. 2, c. 6, or 3 Geo. 3, c. 25 shall be capable of taking and holding any office of trust, either civil or military, and of taking any grant of lands, &c. from the crown, except offices and grants within G. B. and Ireland. A very great influx of foreigners into England having been occasioned in the years 1792 and 1793, by the troubles in France, certain acts were passed (stat. 33 Geo. 3, c. 4, and 34 G. c. 3, 43, 67,) commonly called the alien acts, compelling the masters of ships arriving from foreign parts, under certain penalties, to give an account at every port of the number and names of every foreigner on board to the custom house officers, appointing justices and others to grant passports to such aliens, and giving the king power to restrain and to send them out of the kingdom under severe penalties. The same acts also directed an account to be delivered of the arms of aliens, which if required, are to be delivered up and aliens were not to go from one place to another in the kingdom without passports. These regulations with some alterations, were continued by various subsequent statutes during the war. And now, by stat. 56 Geo. 3, c. 86, the restrictions on aliens which were to have ceased no the conclusion of a general peace, have been further continued, a measure which was justified on the ground of necessity, but which, it is hoped, will be suffered to expire without renewal, when the period limited for its duration shall arrive; the humanity and indulgence towards foreigners, for which our laws have been so celebrated, being equally honorable to the nation and beneficial to its best interests.

* It is a general rule, that an alien cannot take by act of law or by descent, courtesy, dower, or guardianship, per Hale, Vent. 419; 7 Co. 25, a; but yet, if a woman alien marries by the licence of the king, she shall be endowed. An alien has capacity to take lands in fee simple by purchase, but not to hold; hence on a covenant to stand seized an use will arise for an alien; Godb. 275; though by act of law, as by descent; he cannot take even for the benefit of the crown; Calvin's case, 7 Co. 245; 1 Vent. 417; 1 Dy. 283, b. It would seem, however, that if the purchase is made with the king's licence he may hold;

R. had issue three daughters, now living; N. had issue two sons, named P. and W. still alive; J. had no issue; G. the lessor, had issue. J. being seized of the lands in question, devised them to the heir of N. and his heirs, J. and R. being before naturalized by an act of parliament, which enacted "that they should inherit to any ancestor, lineal or collateral, as fully to all intents and purposes, as if they had been natural subjects born in England" J. and his wife died; G. died; P. the eldest son of N. enters as heir of N. claiming by the devise, against whom the lessor brought an ejectment, asson and heir of G. and brother and heir of J. On argument the case appeared to involve two questions; 1st. If the devise to the heir of N. is good; 2d, Whether the plaintiff had any title, or whether the lands should escheat? Which involved the question, whether, if J. and G. being aliens, their sons could be heirs, or inherit to one another, being naturalized by an act of parliament?

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Per Cur. As to the first question, we are all of opinion that the devise is void on two grounds; 1st. Because N. was alive, and no one can be heir to a living person. 2d. N. being an alien, cannot have an heir by the laws of England, hence the defendant has no title. But as to the second point we are divided in opinion. The case was adjourned into the Exchequer Chamber, where seven judges against three held that, by virtue of the act of naturalization, J. and G. were inheritable the one to the other, and so the lessor, son of G. was inheritable to the lands, as heir of G. Held also, that if an alien has two sons born in England, the one shall inherit the other, though neither of them could inherit to the father, for the descent between them is immediate, and they shall make their title in a *mort d'ancestor*, and as heir to the brother, without mentioning the father.—Judgment for the plaintiff. See 2 Mod. 291; 2 Lev. 233; Vaughn. 274; Hob. 29; 2 Jones, 99; 2 Danv. 616; 1 Sid. 192; 2 id. 23; 1 [466.] Keb. 65; 1 Vent. 413; Hard. 224; Cro. Jac. 539; Noy. 159; 2 Hawk. P. C. 648; 2 Rol. Rep. 92; Palmer, 13; Godb. 279.

2. PAGET v. VOSCIUS, E. T. 1676, K. B. 2 Lev. 191; S. C. 1 Vent. 325; 2 Mod. 224; S. C. 2 Jones, 73; S. C. 3 Keb. 638; S. C. 3 Danv. Ab. 171.

Upon a special verdict, it was found at a trial at bar, in an action of ejectment, that Dr. Voscius, the defendant, being an alien, and a subject of the states of Holland, had been deprived of his pension there by public authority; that he had afterwards come to England, and contracted a great friendship with Dr. Brown, a prebendary of Windsor; that a war afterwards broke out between England and Holland, and the king issued a proclamation of war, declaring the Dutch to be alien enemies. Dr. Brown being seized of the lands in question, made his will, containing these words, *inter alia*, viz. "Item. I give all my manor of S. with all my freehold and copyhold lands, &c. to my dear friend Dr. Isaac Voscius, during his exile from his own native country; but if it please God to restore him to his country, or take him out of this life, then I give the same, immediately after such restoration or death, to Mrs. Abigail Haverringham for ever." A peace was afterwards concluded between England and Holland, whereby all intercourse of trade between the two nations became lawful; but Dr. Voscius was not recalled by the States, nor were their any concessions made to him, but his pension was disposed of and given to another. It was also found that the Doctor might return to his own country when he pleased, but that he still continued in England. The question was, whether he or the lessor of the plaintiff, Mrs. Haverringham, had the better title.

Per Cur. We are of opinion that the estate continues in the defendant by this limitation until he is restored to his pension, or some competent way of livelihood is afforded him, different from what he possessed at the time of the devise;

14 H. 4, c. 20. As to purchase in the name of a trustee, see Sty. 20; Al. 14; 1 Rol. Ab. 194; and also 13 G. 3, c. 14, which enables aliens to lend money on lands, &c. in the West Indies. The disability of an alien to hold freeholds or chattels real for his own benefit is not to be considered as a penalty or forfeiture, but it arises merely from the policy of the law, and therefore it has been adjudged that he cannot demur to a bill of discovery of any circumstances necessary to establish the fact; 5 Br. Pl. 91; 4 Vet. 286. Foreigners contracting in this country are bound by the laws of it; Andree v. Fletcher, 2 T. R. 161; and are on a title to equal justice, but not to greater indulgence in our courts than a subject; Duckworth v. Tacker, 2 Taunt. 7.

An alien who had enjoyed a pension in Holland, voluntarily sought refuge in England, and having contracted an intimacy with one A. he made a devise "to him during his exile from his own country," with a limitation over in case he is restored to his country or livelihood." Held, that it was valid; and secondly that it vested in him whilst he remained in this country.

and as it does not appear that there is any alteration in his condition, or any expectation of a pension from the States, more than he had at the time of the devise, judgment must be entered for the defendant.

3. *WILMOTT v. NIXON*, H. T. 1667-8, K. B. 2 Keb. 464; S. C. 1 Lev. 262.

Case will not lie against a foreigner for using a trade in a market town, not being qualified, unless there be custom or bye-law to effect.

In case the plaintiff declared that in Derby there is a custom that every butcher in D. having served an apprenticeship for seven years, may use that trade without damages of another, or from another, that defendant not being a freeman, nor having served an apprenticeship, sold flesh in D. on, &c. not being a market day, whereby the plaintiff could not sell so much as he otherwise might, to his damage, &c. To which the defendant demurred, assigning for cause, 1st. That the custom is not laid positively in fact, that he did use, but only potentially, that he might use, 2d. Ed. 4. 2d. There is no bye-law to restrain foreigners from selling; and without a custom or bye-law, any foreigner may sell in market towns, except on the market-days. 3d. That he sold flesh is not sufficient, for it may be a horse or a dog. And of this opinion was the Court, therefore the defendant had judgment.

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4. *PILKINGTON v. PEACH*, M. T. 1679, K. B. 2 Show, 135.

If an alien artificer in habit a house leased to him for a year, the lessor cannot have an action for use and occupation, since the 32 H. 8. renders the lease void; but if a landlord let a house by the year by parol, he may bring an action for use and occupation. But where this statute was pleaded by a vintner who was an alien, the Court held him not to be an artificer.

In an action of assumpsit upon a *quantum meruit* for use and occupation of a house; on *non assumpsit* pleaded, a special verdict was found, that the defendant was an alien artificer, (the 32 Hen. 8, c. 16, § 13, having made leases to them void) and an indenture of lease by the plaintiff to the defendant for the time mentioned in the declaration, and that there was no special promise beside the indenture of lease, and if, &c. The question was whether a *quantum meruit* lies in this case? *Per Cur.* The intent of the statute was, that no alien artificer should have a permanent estate, and also that they should not exercise any trade in this country, and this statute making void all leases of houses to them, was thought the most effectual means, and the *quantum meruit* will evade the statute if good. But there are other modes of evading it, by making an agreement for so long as the parties pleas, at the rate of so much per annum, and assumpsit will lie thereon. The Court, however, seemed to be of opinion that a contract which amounts to a lease is void by the statute. See 1 Saund. 8, n; 6 Mod. 131; 9 Mod. 104; 3 Salk, 29; 1 Saund. 62; 3 Mod. 94; Lord Raym. 283; Danv. 321; 1 Keb. 116; Woodf. 94; Com. Landlord and Tenant, 50.

5. *BRIDGHAM v. FRONTEE*, H. T. 1684, K. B. 3 Mod. 94.

In debt on bond for performances of covenants in a lease of a house for a certain term of years rendering rent, &c. the breach assigned was, that there was 66l. rent in arrear. The defendant pleaded the statute of 32 Hen. 8, c. 16, § 13, that all leases of dwelling-houses or shops made to any stranger or alien artificer shall be void, and set forth that he was a vintner, and an alien artificer; to which the plaintiff demurred. *Per Cur.* This statute refers to another of 4 Rich. 2, c. 9, which prohibits alien artificers from exercising any handicraft in England, unless as a servant to a subject skillful in the same art, upon pain of forfeiting his goods; so that it is plain that such who used any art or manual occupation were restrained from using it here to the prejudice of the king's subjects. Now the mystery of a vintner chiefly consists in mingling of wines, and that is not properly an art, but a fraud.—Judgment for plaintiff. See 2 Stra. 1082; 1 Saund. 8; 9 Mod. 104; 2 Show, 135; 1 Lord Raym. 283; 10 Mod. 91; 1 Sid. 309.

6. *ROGERS v. ARTHUR*, E. T. 1692, K. B. 3 Salk, 29.

Semb. A lease to an alien artificer is forfeitable to the king.

At common law, a lease made to an alien artificer, either of a house or shop, was good between the parties, but forfeitable to the king; but now if a shop is let to an alien artificer, the lease is void by the statute 32 H. 8; and if the lessor brings an action of debt for rent, the lessee may plead this act in bar to the action; but if a house or shop is let to an alien gentleman, the lease is not void within that statute, neither is it pleadable in bar to an action.

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7. *JEVENS v. LEVEMERE*, M. T. 1665, K. B. 1 Saund. 5; S. C. Sid. 308.

In a plea of the statute 32 H. 8 it

An action of debt was brought upon an obligation; and upon oyer demanded of the condition, it was granted, and it referred to indentures, which

were recited in *hæc verba*; the indentures were upon a lease of a house in Westminster, reserving rent with covenants, &c.; the defendant pleaded 32 H. 8. c. 6. and that he was an alien, &c. and so would avoid the lease and the rent, and the security; several exceptions were taken to the plea: 1st. He had said where he is an artificer; but this was overruled, for it is a personal quality, and shall follow the person, and is universal. 2d. The defendant ought to have set forth and pleaded the indenture; but; *Per Cur.* Since the plaintiff has brought it into court, as must be intended, it is sufficiently set forth, the defendant may plead upon it without setting it forth again. 3d. The plea is that *indentura prædicta vacua existit*, and this was likewise overruled; for the law is, that the indentures and bond make but one security; and if the covenant be released before breach, the bond will signify nothing. 4th. This appears to be a messuage or tenement, but he has not averred it to be a mansion-house or shop, according to the statute, and upon this point the Court was at first divided. Keyler, J. held that *messuagium* is *mansum, et quod dare constat non debet verificare*. Morton, J. Though *messuagium* be a word of art, and may be applied to other things in a large sense, as to a barn, chappel, &c. yet in propriety it is a mansion-house, and shall be intended so. Twisden and Windham, J. That it ought to have averred; for he must bring himself precisely within the statute, especially in such a case as this, where he would avoid his own contract. But afterwards the defendant had judgment.

8. THE KING v. THE INHABITANTS OF EASBOURNE, T. T. 1603, K.B. 4 East, 103. An alien amy is entitled to a settlement in this country. It appeared that Anne Borchert had been removed from the parish of Seaford to the parish of Eastbourne; that her maiden settlement was in Eastbourne; that about seven years ago she married one John Borchert, a German, at the time an alien amy; that the said John Borchert, was at the time of the removal resident in a house in Seaford of above the value of 10*l.* which he had rented for two years, carrying on the trade of a baker; and that the session on appeal had confirmed the order, subject to the opinion of the Court upon the above facts. *Per Cur.* The statute 32 Hen. 8. c. 10. makes leases of dwelling-houses or shops granted to any stranger artificer void; but if an alien amy occupies a dwelling-house, under an agreement not amounting to a lease of the yearly value of 10*l.* for forty days, he gains a settlement under the stat. 13 & 14 Car. 2. c. 12. It has been urged that as no obligation to maintain poor foreigners existed anterior to the passing of the statutes, pointing out the different methods of acquiring settlements, they are not included in the statutory regulations which were thereby introduced; but the law of humanity is anterior to all positive laws, and obliges us to afford relief. Besides, the object of these acts was only to specify how and in what manner the burden of supporting the poor should be borne.—Orders quashed. See 1 Sessions Cases, 97; 3 Burn's Justice, tit. Poor (Overseers), § 1; 1 Saund. 8; 2 Show. 235; 13 & 14 Car. 2. c. 12; 3 W. 3. c. 11; 1 Ed. 6. c. § 13; 3 & 4 Ed. 6. c. 16. § 16; 2 & 3 Ann. c. 6. [469]

9. STRITHORST v. GRÆVE, ESQ. M. T. 1770, C.P. 3 Wils. 145. S.C. 2 Bl. 723. The statute of limitations does not commence against a plaintiff who is a foreigner until he comes into this realm. To an action of *assumpsit*, plea *non assumpsit infra sex annos*; replication, that he the plaintiff was abroad at the time of making of the promises, and that he hath ever since been, and still is, abroad. Demurrer and joinder therein. *Per Cur.* If the plaintiff is a foreigner, and doth not come to England in fifty years, he still hath six years after his coming to England to bring the action, and if he never comes to England himself, he has always a right of action while he lives abroad, and so have his executors or administrators after his death. Vide post. Limitations. statute of.

III. RIGHTS AND INCAPACITIES OF THIRD PARTIES CONNECTED WITH.

1. REX v. FERDINAND DE MIERRE, T. T. 1771, K. B. 5 Burr. 2785.

Upon an indictment against the defendant for refusing to take upon himself the office of constable, to which he had been duly elected, the question was, ble. An alien is not eligible as a constable.

whether he could be chosen to that office, being a foreigner naturalized by a private act of parliament. It came before the Court upon a special verdict, and was twice argued; after the second argument, *Per Cur.* We are of opinion that as the office of constable is clearly a civil office of trust, and the legislature having expressly incapacitated naturalized foreigners from taking any civil office of trust generally and without exception, it is not in the power of the Court to make an exception which the legislature have not in the present case thought fit to introduce.—Judgment for the defendant. See 12 & 13 W. 3. c. 2; 1 Geo. 1. c. 4; 1 Geo. 2. c. 3.

2. *Doe ex dem. DUROURE v. JONES*, T. T. 1791, K. B. 4 T. R. 300.

The mother of the plaintiff was a natural born subject of this kingdom, his father an alien, and he himself was born abroad. On the question whether he could inherit to his mother here, it was argued that as the statute 25 Edw. 3. st. 2. gave the right of inheritance to those whose fathers and mothers were liege subjects of the king, and several determinations had held those within it whose fathers only were so, the statute must be taken declaratively; but *Per Cur.* We entertain a different opinion. The wife of a subject is *sub potestate viri*, and so under the allegiance of the king; but an alien the husband of a natural born subject cannot be so considered, and this agrees with the subsequent statutes.—Judgment for the defendant. See 7 Ann. 5. 10 Ann. c. 5; 4 Geo. 2. c. 21; 3 Geo. 3. c. 21; 25 Edw. 3; 1 Bac. Abr. 77; Collingwood v. Pace, 1 Vent. 422.

3. *MICHELOTTE v. DILLON*, H. T. 1798, K. K. 2 Esp. N. P. C. 621.

In answer to an action by the plaintiff against the defendant on a promissory note made in 1785, for the payment of a certain number of livres; it was contended that under the alien bill 34 Geo. 3. c. 9. the plaintiff was not entitled to recover, since the note was given in Paris, and the plaintiff had merely come here in order to sue on the bill, and with the express intention of returning.

Per Lord Kenyon, C. J. I am of opinion that the 7th section of the above statute is a sufficient answer to that objection; for if a more extensive construction was put on the act of parliament it would be unjust, for the party might be abroad, the deprived of suing, as the statute of limitations would attach.—Verdict for the plaintiff.

4. *SINCLAIR v. CHARLES PHILLIPS MONSIEUR DE FRANCE*, H. T. 1801, C. P. 2 B. & P. 363.

The defendant had been holden to bail upon an affidavit to the following effect: "That the defendant was indebted to the plaintiff for money had and received, to and for the use and on the account of the said plaintiff, and for money by the said plaintiff paid, laid out and expended, lent and advanced in England, to and for the use and on account of the said defendant, &c. and upon an account stated in England." A rule nisi was obtained to discharge the defendant out of custody on entering a common appearance, on the ground that he was a foreigner resident in this kingdom, who had quitted his own country in consequence of the French revolution, and was therefore protected by 38 Geo. 3. c. 50. § 9. *Per Cur.* The money is said to have been paid in England, but the contract for the loan appears to be abroad. The debt in the eye of the law, therefore, arises on the continent, and is not altered by the locality of the expenditure. And notwithstanding the transactions and adjustments subsequent to the original agreement, the debt still remains a debt within the meaning of the statute. An honourable acknowledgment made in England of a debt contracted abroad, will change the property of persons in the defendant's situation; but if the evidence they themselves afforded were to effect their persons also, and deprive them of the protection afforded by parliament, the intention of the legislature would be completely defeated.—Rule absolute. See 41 Geo. 3. c. 106; 42 Geo. 3. c. 92. § 1; 43 Geo. 3. c. 155. § 1; 55 Geo. 3. c. 54. § 1; 56 Geo. 3. c. 86. § 19; 58 Geo. 3. c. 96; 1 Geo. 4. c. 105; 3 Geo. 4. c. 97; 5 Geo. 4. c. 37; from which it appears that this protection from arrest is continued for two years from June, 1824.

stated in this country, was held to be invalidated by a disclosure of the above circumstances.

5. PETER MOLIÉRE'S CASE, 1758, Fost, C. L. 188, n.

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A French prisoner of war being indicted for privately stealing in the shop of a goldsmith and jewelry a diamond ring; which by statute 10 & 11 W. 3, c. 23, is an offence punishable with death; the judge who tried him thought it improper to proceed capitally upon a local regulation, and therefore advised the jury to acquit him of the circumstance of stealing in the shop, and to find him guilty of simple larceny, to the value laid in the indictment.

Semb. An alien is not punishable capitally under local enactments.*

6. DERRY V. THE DUCHESS OF MAZARINE, H. T. 1690, K. B. 1 Ld. Raym. 147; S. C. Comb. 402; S. C. 1 Salk. 116.

To an action of *assumpsit* for wages and money lent; the defendant pleaded coverture, and issue thereon. Cogent evidence was produced at the trial, that the defendant's husband was alive in France; the jury found a verdict for the plaintiff because the Duchess had lived in this country for 20 years as a *feme sole*, and had contracted continually as such and her husband was an alien enemy. On a motion to set aside the verdict on the supposition that it was against evidence, and contrary to law, as a *feme covert* could not be sued as sole for debts and contracts, without a divorce and alimony, though the husband might be a foreigner.

The wife of an alien residing here under the protection of the government is chargeable as a *feme sole*.†

Sed per Holt, C. J. When the husband is an alien, and under an absolute disability to come and live here, the law perhaps will make the wife of such a husband chargeable as a *feme sole* for her debts and contracts, for this case does not differ from the case of Lady Belknap and Lady Weyland, cited Co. Lit. 112, b; 132, 1; Roll. Rep. 400; who were allowed to be able to sue and be sued on the abjuration or banishment of their husbands, as if they had been sole.—Judgment for plaintiff. Vide post, tit. Baron and Feme; and Walford v. Duchess de Pienne, 2 Esp. 554; Franks v. Same, id. 587; Kay v. Same, 3 Camp. 123; De Gaillon v. Victore Harrell L'Aigle, 1 B. & P. 357; Marsh v. Hutchinson, 2 B. & P. 226; Farrer v. Countess of Granard, 1 N. R. 80.

[472]

Alien Enemy.†

I. WHO ARE, OR WHO ARE NOT CONSIDERED AS, p. 472.

II. RIGHTS AND DISABILITIES OF, p. 476.

III. OF THE PLEADINGS AND EVIDENCE CONNECTED WITH, p. 482.

I. WHO ARE, OR WHO ARE NOT, CONSIDERED AS.

1. O'MEALLY V. WILSON AND ANOTHER, M. T. 1808, K. B. N. P. 1 Camp. 482.

The defendants, to a *scire facias* against them as the bail of N. pleaded, 1st. That plaintiff before and at the time of exhibiting his bill against N. was

* This distinction regarding capital punishments appears untenable and inconsistent with the provisions of stat. 32 Hen. 8, c. 16, § 9 that every alien coming into the king's dominions shall be bounden by and unto the laws and statutes of this realm," and irreconcilable with the rule that an alien whilst here is generally subject to our laws, and owes a local and temporary allegiance to the sovereign by whose authority those laws are administered, and by whom his person and property are protected; consequently if during such residence he commit an offence which in the case of a natural born subject would amount to treason, he may be dealt with as a traitor, and this whether his sovereign be in amity or at enmity with us. The doctrine of Lord Coke, that an alien enemy cannot be guilty of treason, must be taken with this restriction, namely, where he invades this country, and is taken in war, in which case indeed he is not punishable at all, according to the course or by the rules of the municipal institutions, but is to be dealt with according to the law of nations in military affairs. See 1 Hawk, P. C. 17; Hob. 271; 3 Inst. 4, 5. A resident alien it hath been adjudged is entitled to the benefit of a general pardon; but if he is not in the kingdom at the time of promulgation of the pardon he is not within the benefit of it, for he is no otherwise a subject but by his residence here. Courteen's case, Hob. 270.

A British subject will be deemed an alien enemy if he reside and carry on trade in a foreign country at war with G. Britain.

† There is a great difference between the cases of an Englishman residing abroad, leaving his wife in this country, and of a foreigner so doing. The former may be compelled to return at any time by the king's privy seal. There is not any case in which the wife has been holden liable, the husband being an Englishman. Per Heath, J. in Marsh v. Hutchinson. See also Farrer v. Countess of Granard, 1 Bos. & Pul. N. R. 80: where Heath, J. said, the case of De Gaillon v. L'Aigle proceeded much upon the fact of the defendant's husband being a foreigner.

‡ An alien enemy is defined to be "a subject to one that is an enemy to the king," Co. Lit. 1296; or under the allegiance of a state at war with England. See Sperenberg v. Banatya 1 B. & P. 163.

A British born subject domiciled in a neutral country is not prevented from trading with a country inimical to this; [473] Or does the occupation of a country by one of two belligerents, necessarily make the inhabitants enemies to the other belligerent? Or a residence in a foreign country is not sufficient to establish an adhering to the enemy unless it be voluntary, that is, unless the party had opportunities of leaving it, and refused to take advantage of them. An alien enemy executor may maintain an action. An alien enemy comorant here by the king's licence may sue though he came in the time of war.

and is an alien enemy under the government of France; and further that a war had been and is carried on, by the government of France, against this realm; 2d. That the plaintiff is a subject of France, residing and carrying on trade as a subject there; 3d. The same as the last, except adding that the plaintiff adheres to the government in that country. The evidence disclosed that the plaintiff lived in France for many years, and still resides at Paris; but that he represented Ireland to be his native country. This conduct it was contended clearly made him an alien enemy. Per Lord Ellenborough, C. J. If the plaintiff is an Irishman by birth, and voluntarily resides and carries on trade in France, the defendants are clearly entitled to a verdict; since it is a general rule that if a British subject resides in an enemy's country, without being detained as a prisoner of war, he is incapacitated from suing here.

2. *BELL v. REID, and BELL v. BULLER*, T. T. 1813, K. B. 1 M. & S. 726; *S. P. MARRYATT v. WILSON*, E. T. 1799, C. P. 1 B. & P. 430.

Per Cur. From the uniform current of authorities it is an established principle, that a natural born subject domiciled in a neutral country, may, in respect of such his domicile, be entitled to enjoy the commercial benefits and privileges accruing to the inhabitants of that country, and be exempt from the disabilities and restraints attaching on a natural born subject of this country. Whether, however, the effect produced by these decisions is or is not fraught with political danger and inconvenience, so as to require certain modifications and restrictions which do not at present exist, is perhaps a question well worthy the attention of the legislature.

3. *HAGEDORN v. BELL*, E. T. 1813, K. B. 1 M. & S. 450.

Per Cur. Although a state may be in the hostile possession of one of two belligerents, that will not necessarily constitute her subjects enemies to the other belligerent, if the sovereign power of the latter chose to permit a continuance of commerce with them.

4. *ROBERTS v. HARDY, &c.* H. T. 1815, K. B. 3 M. & S. 533.

Per Cur. Where a person sets out for a foreign country then in amity with this, and it does not appear at what time he arrives there, or what time was afforded him after his arrival, and after the country became hostile to take measures for quitting it during the period legally allowed, those disabilities which belong to a person who adhered to the king's enemies does not necessarily attach. See 3 B. & P. 113; 1 Campb. 482; 2 N. R. 97; 3 Rob. Adm. R. 17; &c. 5 id. 91.

5. *VILLA v. DIMOCK*, T. T. 1692, K. B. Skinner, 370.

In an action by an executor for work and materials found for the defendant by the testator, the defendant pleaded that the father of the plaintiff, who was the testator, and the plaintiff, are alien enemies born in France; to which the plaintiff demurred. *Per Cur.* The plea is bad; for it is not shown that the testator did not die before the war; so that the plaintiff might be executor; and the action attach in him before hostilities commenced; and then being dead before he could become an alien enemy, he might have an executor; and the action being in *auter droit*, it shall be maintained.—Judgment for plaintiff. See 1 Bac. Ab. 5, 137; Co. Lit. 1296; 1 Salk. 46; 1 Ld. Raym. 282; 1 Lutw. 34; Com. Dig. Administrators, B. 6; Cro. Car. 9; Brownl. 31; 11 Vin. Ab. 94; 2 Vern. 126; Toll Executors, 34, 94.

6. *WELLS v. WILLIAMS*, M. T. 1696, C. P. 1 Lutw. 35; S. C. 1 Salk. 46; S. C. 1 Ld. Raym. 282.

Debt upon bond; the defendant pleaded that the plaintiff was an alien enemy, born in France of French parents, who were alien enemies, and that he came to England *sine salvo conductu*, and concluded in bar. The plaintiff replied that at the time of making the bond, he was, and yet is, here *per licentiam et sub protectione domini regis*; the defendant demurred. *Per Cur.* If an alien enemy comes here *sub salvo conductu* he may maintain an action; so if an alien enemy comes here in time of peace, *per licentiam domini regis*, as the French protestants did, and lives here *sub protectione*, and a war afterwards happens between the two nations, he may maintain an action, for suing

is but a consequential right of protection, and therefore an alien enemy who is here in peace under protection may sue on a bond *aliter* of one commorant in his own country. See *Fost. Cro. Law*, 186. [474]

7. *RICORD v. BETTINGHAM*, M. T. 1764, K. B. 3 Burr, 1734; S. C. 1 Bl. Rep. 563; *S. P. CORNU v. BLACKBURN*, E. T. 1781, K. B. 2 Doug. 640.

An alien enemy (the captain of a French privateer) took an English ship on the high seas in time of open war, and ransomed the ship and cargo for 300 pistoles. The mate was delivered to him as an hostage, but died in prison. The ransom bill was signed by both captains and by the hostage, and by it the English captain undertook himself and his owners to pay the French captain 300 pistoles within two months. An action was held to be maintainable by the French captain against the English captain, notwithstanding the death of the hostage, and the plaintiff's being an alien enemy. See post, tit. Ransom.

8. *ANTHON v. FISHER*, M. T. 1781, Ex. Chamb. 2 Doug. 650, n.

The same question arose in this case as in the preceding, and the judges in the Court of Exchequer Chamber determined unanimously that an alien enemy cannot by the municipal laws of this country sue for the recovery of a right claimed to be acquired by him in actual war; and the judgment of the Court of King's Bench was reversed.

9. *BRANDON v. NESBITT*, M. T. 6 T. R. 23; *S. P. BRISTOW v. TOWERS*, M. T. 1794, K. B. 6 T. R. 35. *POTTS v. BELL*, E. T. 1800, K. B. 8 T. R. 548.

The declaration in an action on a policy of insurance on goods on board an American ship from L. to B. averred, that the policy was effected for the benefit of certain persons (naming them) who were interested in the goods; and that the ship was captured as a prize. Pleas, 1st, That the persons interested were aliens born in foreign parts, to wit, at B. in France; and that before the ship sailed, a public and open war commenced and was carried on. 2d. The plaintiff alleging that the persons were living in France, and enemies (without saying they were enemies born), and that the goods were sent from L. after the commencement of the war, for the purpose of being sold in France the kings, &c. Replication to the first plea stated, that the persons interested in the insurance were before the commencement of the suit indebted to the plaintiff in sums of money exceeding the respective interests of those persons in goods insured; replication to the second, the plea stated that the goods insured were not prohibited by any law at the time of the policy, and that they were put on board the ship before the commencement of the war. On demurrer and joinder in demurrer. *Per Cur.* We are of opinion that judgment must be given for the defendant on the ground that an action will not lie either by or in favour of an alien enemy. Indeed we have not been able to find a single case in which an action has been supported by an alien enemy. For though it was held in *Ricord v. Bettingham*, 3 Burr, 1734, that an action by an enemy on a ransom bill might be maintained, the action was not brought until peace was restored, which got rid of the objection.— Judgment for defendant.

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10. *ROBERTS v. HARDY*, H. T. 1815, K. B. 3 M. & S. 533.

Per Cur. If a debt is due to two parties, and one of them is an alien enemy, the other cannot enforce its payment.

11. *THE CASE OF THREE SPANISH SAILORS*, M. T. 1779, C. P. 2 Black, 1824.

An application was made for an *habeas corpus* to be directed to the commander of the Nightingale sloop of war to bring up three Spanish seamen, on an affidavit made in Spanish, but translated and sworn to be a correct interpretation, stating that they were taken as prisoners of war on board a Spanish privateer, and carried into Jamaica, where our homeward bound fleet wanting hands, they were persuaded to enter on board a merchant vessel, captain H.

* Nor in favour of a merchant residing in and carrying on trade in an enemy's country; *Albrecht v. Sussman*, 2 Ves. & B. 323; nor of a British subject living in, and carrying on trade under the protection and for the benefit of an hostile state, *M'Connell v. Hector*, 3 B. & P. 163; *secus*, if his residence in an enemy's country was for the purpose of a trade licensed by the government of this country. *Ex parte Baylehole*, 18 Ves. 525.

Formerly an alien enemy might have maintained an action in this country for recovery of a right claimed to be acquired in actual war; but this doctrine has since been overruled.

And it is now clearly settled that an action does not lie at the suit of an alien enemy.*

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A demand due to two, one of whom is an alien enemy, cannot be enforced by the other.

An *habeas corpus* does not lie for an alien enemy who is a prisoner of war, how ever ill used or deceived.

L. commander, on a promise of wages, and an immediate exchange upon their arrival in England; but that Captain L. on coming to this country, had refused to pay their wages, and had turned them over to the *Nightingale* as prisoners of war, which was urged to be a palpable breach of faith, which the court would interfere to prevent. *Per Cur.* These men, upon their own showing, are alien enemies and prisoners of war, and therefore not entitled to any of the privileges of Englishmen, much less to be set at liberty on an *habeas corpus*; the story as related by them is not much to the credit of Captain L. but we can give them no redress; if they can show they have been ill used, it is probable they may find some relief from the Court of Admiralty. Rule refused.

Choses in action belonging to an alien enemy are forfeited to the crown.

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The king may license a trading with an enemy, or may license it with certain qualifications; in which latter case the plaintiff must show due conformity with the conditions imposed.

Where a trading with an alien enemy's country is licensed by the king's authority, an insurance effected on the enemy's ship as well as on the goods and specie put on board, for the benefit of the British subjects by the British agent of both parties in whose name it was made, is valid, and an action may,

12. ATTORNEY GENERAL V. WEEDEN AND ANOTHER, M. T. 1699, Parker, 261.

A Frenchman naturalized made his will during the war, and gave several legacies to Frenchmen living at Bordeaux, and died; some of the legacies were payable immediately, and others when the legatees became of age; a commission issued to find this matter; in the mean time peace was established, and subsequently an inquisition was found and returned; after debate:—

Per Cur. We are of opinion, 1st, That choses in actions vested in an alien enemy are forfeited to the crown; 2d, That this ought to be found by inquisition to make a title to the king, and that this is an inquisition of entitling, and not of instruction; 3d, That the peace being concluded before the inquisition was taken, discharges the forfeiture; 4th, That the inquisition taken afterwards, does not relate to set up the forfeiture, for the cause is but temporary, and that cause being removed before the king's title was found, the finding after should not relate back.

See Page's case, 5 Co. 52; 19 Edw. 4, 6; 1 Saund. 361; Ra. Ent. 605; 2 Roll. Abr. 399; 8 Rep. 170; 1 Inst. 118; 3 Bulst. 27; Freem. Rep. 39.

II. RIGHTS AND DISABILITIES OF.

1. VANDYCK AND OTHERS V. WHITMORE, E. T. 1801, K. B. 1 East, 475. S.

P. VANHARTHALS V. HALKED, *ibid.* 487, n.

Per Cur. The king may, at common law, licence a trading with an enemy's country. He may also qualify his licence; in which case the party seeking to protect himself under such licence, must conform to the requisitions in it. See 45 G. 3, c. 34; 1 Holt, Shipping, 170, 178.

2. KENSINGTON V. INGLIS AND ANOTHER, In error, H. T. 1807, K. B. 8 East, 273.

An insurance had been effected in this country by the plaintiff, who was a British subject, on an alien enemy's ship, and on a British subjects goods and specie put on board the same. The policy was in the agent's own name. The goods were brought from the enemy's country in the alien enemy's ship, into our colonial ports. This trading was licensed by the king's authority. The declaration averred a loss of the vessel with the other goods and specie on board. In the second count there was an allegation that the vessel, on board which the goods and specie were loaded, was not a ship belonging to his majesty or any of his subjects. Plea, *non assumpsit*. Verdict for plaintiff in the court of Common Pleas. A bill of exceptions was tendered at the trial to the Lord Chief Justice, which, on being sealed by him, was, together with a transcript of the record, handed over to the court of King's Bench. *Per*

Cur. Although the king's licence cannot in point of law have the effect of removing the personal disability of the trader in respect of a suit, so as to enable him to sue in his own name, yet it purges the trust in respect to him of all those injurious qualities, in regard to the public interest, which constituted the particular ground of objection to the trust in the two cases in 6 T. R. 35 & 23, which have been so much relied upon in argument by the plaintiffs in error. No public policy is contravened by permitting the present trustee to support his action. On the contrary, this country, in furtherance of the same policy which allows the granting of licences to authorize the trade, ought to give effect to the ordinary means of indemnity by which that trade may be best secured and protected. As there is, therefore, no legal incompetence in the party suing, and no public policy which prevents the main-

tenance of the present action, for the benefit of those who were the objects of the licence, there must be judgment for the defendants in error. See *East*. 266.

3. *BUOLTON AND ANOTHER V. DOBREE*. 1707. K. B. 1 Campb. 163.

To an action on a policy of insurance, the defendant pleaded that the action was brought on behalf of H. E. a Dane, an alien enemy, not resident within the king's dominions, under letters of safe conduct, licence, or protection. Is the sue was taken on the licence, and Per Lord Ellenborough, C. J. I am of opinion, that a licence from the king to H. E., then an alien friend, authorizing him to take a voyage to an enemy's country, and to return to England, does not operate as a licence to reside, though the voyage did not terminate till after the commencement of hostilities with Denmark, and though he remains here unmolested.—Plaintiff nonsuited.

4. *USPARICHI V. NOBLE*. H. T. 1812. K. B. 13 East. 332.

The plaintiff a spaniard by birth, who had been domiciled as a merchant in England for several years, having purchased and shipped goods in a neutral vessel, on account of a correspondent, a native of, an resident in Spain, obtained a licence from the British government for a licence to proceed with her cargo on a voyage from an English port to a port in Spain. A policy was affected on the goods in the usual form, and stated to be made by the plaintiff "as well in his own name as in the name of any person to whom the same might appertain." The vessel, in the prosecution of the voyage, was captured by a French privateer, and carried into a port in Spain, where the vessel and cargo were condemned. At the time of the capture and condemnation, France and Spain were co-belligerent allies, at war with England. A verdict had been found for the plaintiff subject to the opinion of the Court, upon the preceding facts. *Per Cur.* The plaintiff is entitled to recover, and the action is well brought in his name, there being an averment of interest in the purchase. The legal result of the licence is, not only that the plaintiff, the person licensed, may sue in respect of such licensed commerce in an English court of law, but that the commerce itself is to be regarded as legalized for all purposes of its due and effectual prosecution. For the purpose of the licensed act of trading (but to that extent only), the person licensed is to be considered as virtually an adopted subject of this country, and his trading, as far as the disabilities arising out of a state of war are concerned, is British trading. The plaintiff and the Spanish purchaser of the cargo are actually privy to the objects of the British Government, and acting in furtherance of them, and in direct opposition to, the laws and policy of their own country; and it cannot be contended to be illegal, to insure a trade carried on in contravention of the laws of a state at war with us, and in furtherance of the policy of our country and its trade; and which this trade in question, sanctioned as it is by his majesty's licence, must be deemed to be.—Judgment for plaintiff. See 2 East. 473; 3 id. 1274; 9 id. 284; 10 id. 536: 1 Rob. Adm. Rep. 201-2; 1 Lord Raym. 282; Doug. 467.

5. *THE KING V. DE MANNEVILLE*. E. T. 1804. K. B. 5 East. 221.

A writ of *habeas corpus* had been directed to the defendant to bring up the body of her daughter, an infant of eight years old. It appears that the applicant was a Frenchman, that the mother was an Englishwoman; that she had been living separate from her husband, and had the care of the child, and that she was apprehensive that the father meant to carry the child abroad.

Per Cur. The father has an universal legal right to the custody of his children, unless the Court perceive that he intends to abuse his right, or, from circumstances, are afraid that the child will be injured for want of nurture, or endangered in any other respect. The supposition that the father had intended to take the child from England is repelled by the fact of its appearing from the mother's affidavit, that the only grounds for such apprehension were the defendant having threatened to carry away the mother at a distance from her friends, and having afterwards threatened to take away the child from her. Let the child be remanded to the custody of the father. See 5 T. R. 278. n.; 5 East. 224; 1 N. R. 148; 4 Taunt. 408.

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6. SPARENBERGH v. BANNATYNE. T. T. 1799. C. P. 2 Esp. N. P. C. 581; S. C. 1 B. & P. 163. S. P. REX. v. DESPARDO. 1 Taunt. 29.

The disabilities of an alien enemy rest on a neutral only so long as he adheres to a state at war with this country; not, therefore, from the time of his being a prisoner of war; consequently such a subject taken on board the enemy's fleet, may, whilst in confinement, sue upon a contract entered into by him as a prisoner of war.

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To an action of *assumpsit* the defendant pleaded, 1st. *Non-assumpsit*; 2nd. That the plaintiff is an alien, born in Holland, and within the allegiance of a foreign power; and that, before the issuing of the writ, a public war commenced, and is still carried on, between our king and the government in Holland; and further, that the plaintiff was and still is an enemy of our lord the king; and this, &c. wherefore, &c. 3d. Similar to the last, but omitting that the plaintiff is an alien born in Holland. To the first plea the plaintiff replied by joining issue; to the second he replied, that before the making of the said several promises in the said declaration mentioned, he was a prisoner of war in the custody of our lord the king, in parts beyond the seas, to wit, at St. Helena; and being such prisoner, the plaintiff was, by permission of the commanding officer of the island of St. Helena, retained by the defendant as a seaman on board certain vessel; and further, that the plaintiff did serve as such seaman a certain voyage from St. Helena to London. Traversing that he the plaintiff, at the time of suing forth the writ, was an alien enemy of our lord the king; and being on enemy, or adhering to the enemies of our lord the king; and this, &c. whereof, &c. 3d replication, the same as the second, and issue thereon. It appeared in evidence that the plaintiff being a native of Germany, was taken a prisoner whilst serving as a sailor on board the Dutch fleet, and sent to St. Helena in a British ship, as a prisoner of war; that a British merchantman, at the latter place, being in want of sailors, applied to the governor of St. Helena, for permission to engage Dutch prisoners as seamen, which was granted by the governor; and that the defendant engaged the plaintiff as a seaman; and that the plaintiff had performed his duty as a sailor; and that on the arrival of the vessel in England, the plaintiff, among others, was delivered over to the commissary, and was in custody as a prisoner of war at the time he brought the action.

The judge, before whom the cause was tried, was of opinion that the plaintiff was a neutral, taken in an act of hostility to this realm, but that he was not vested with the permanent character of an alien enemy. Merely joining in an act of hostility, for which act he remains a prisoner, does not constitute him an alien enemy; though whilst he continued in the enemy's service, he was one most undoubtedly; but when that service ceased, his incapacity ceased too; consequently he was entitled to recover. On a motion for new trial,

Per Cur. The defence in this case has no foundation in conscience, in justice, or in public policy, nor do we feel inclined to assist it. The chief difficulty, if any arises, in consequence of its having been contended, that, at the period of capture, he was an alien enemy; that character must continue till he ceases to be a prisoner of war. Now to say that that argument is tenable would be incomprehensible, for how did he become an alien enemy? Not in consequence of any permanent character, but because he joined in one act of hostility, which, in our opinion does not tend to fix on him the permanent character of an alien enemy, as it is undoubtedly clear that at the time he discontinued serving the enemy his incapacity ceased. Can it be denied but that an enemy, under the king's protection, may sue and be sued; On the contrary, there are many instances where he may maintain an action. Assuming that an officer is possessed of property about his person which he wishes to obtain money on, and sends it to a tradesman for that purpose, who is dishonest enough to detain it; surely the law, which is founded in reason and principle, will say, that he shall recover either the article, or the value thereof, from the tradesman. Nor is this a stronger case; here the contract in question was made by permission of the king's officer, and therefore by the licence of the king, under whose authority it may be presumed he acted; consequently, if we were to suffer this defence to avail, it would be one of the basest, one of the most impolitic, nay, immoral defences that was ever set up in a court of justice, against a man who did his duty faithfully, and who, it appears, assisted the ship in distress, and perhaps without that assistance the vessel could not have proceeded; and, in lieu of payment to him that asks for

a moderate reward, he has a plea of alien enemy. Certainly, if there be a distinction between the permanent character of an alien enemy, and the temporary one, we shall adopt the latter; we are, therefore, of opinion that this distinction ought to prevail; that the plaintiff, being a prisoner of war at the time of making the contract, does not prevent him from maintaining an action on the contract. Rule discharged. See *Bristow v. Towers*, 6 T. R. 85; *Anthon v. Fisher*, Doug. 649. n; *Wells v. Williams*, 1 Salk. 46; *Raym.* 282; *Co. Lit.* 129. b; *Com.* 212; 1 *Ld. Raym.* 282; 7 *Mod.* 150; 3 *B. & P.* 112; *Hale*, P. C. 164; *Rast.* 252.

7. *REX v. DESPARDO*, M. T. 1807, C. P. 1 Taunt. 29.

Per Heath, J. If an alien enemy, a prisoner of war, makes a contract, it may be enforced by the king for the benefit of the crown.

8. *TOUTENG AND ANOTHER v. HUBBARD*, M. T. 1802, C. P. 3 B. & P. 291.

This was an action to recover damages against the defendant for not freight-ing a ship, in pursuance of the terms of a charter-party. A verdict had been found for the plaintiffs for 397*l.* 6*s.* 6*d.* subject to the opinion of the Court on the following case. The charter-party had been made between the plaintiff, who was the master of a Swedish ship, and the defendant who was a British subject; by which it was agreed that the ship should proceed with all convenient speed to the island of St. Michael for a cargo fruit, and return thence with to the port of London, "restraint of princes and rulers during the voyage always excepted." It appeared that the vessel had sailed from London, but had been driven back by storm into Ramsgate harbour, and had been there detained by an embargo suddenly ordered by the British government against all Swedish vessels, from the month of January till June, at which latter period the season for shipping fruit at St. Michael's expired. Upon an offer by the plaintiff to proceed on the voyage, after a removal of the embargo, the merchant replied that the ship could not be loaded at St. Michael's, the season for shipping fruit there being passed. The actual damage the plaintiffs sustained by sailing on the voyage till the ship was driven back, by paying the sailors during the embargo, &c. amounted to 397*l.* 6*s.* 6*d.* for which a verdict had been obtained. The whole freight of the ship under the memorandum for the charter-party would have amounted to 748*l.* 2*s.* 6*d.* The question for the opinion of the Court was, whether the plaintiffs were entitled to recover either of the sums or any part thereof; if not, a nonsuit to be entered. *Per Cur.* The defendant having expressly dispensed with the plaintiff's proceeding to St. Michael for the cargo as soon as the embargo was at an end, no objection could arise on the ground of his not having completed the voyage. But the basis of our decision, and which must now be taken as a decided point, is this, that a British subject is not liable to answer for any damages which the owner of a foreign vessel may sustain from an embargo laid by the British government on foreign ships, even in the nature of reprisals and partial hostility. Perhaps, if this disability had been created by the act of a third state, or if the question had arisen between two British subjects, a suspension of the performance of the contract might have been the only consequence. But here the impossibility has accrued from an act of the British state, to which all his Majesty's subjects are parties, occasioned by an act of the Swedish Court, to which all the subjects of Sweden are parties. The plaintiffs, who have therefore obtained a verdict, must have a judgment of nonsuit entered against them, as the defendant has been disabled from completing the terms of his agreement from the default of the very party who is now wishing to enforce its performance. Judgment of nonsuit. See 6 T. R. 413; 8 id. 259; over-ruling 2 Vern. 242; *Alleyne*, 27; *Molloy*, b. 2. c. 4. s. 5; *Sir William Jones*, 179; 1 *Ld. Raym.* 321; 2 id. 480; *Dyer*, 27. pl. 178. 186-7-8; id. 48. pl. 5; *Valin*. vol. 2. p. 144; 4 *Rob.* 77.

9. *BLIGHT AND OTHERS v. PAGE*. Sittings at Guildhall after M. T. 1801, *coram* Lord Kenyon, 3 B. & P. 295. n. a.

This was an action upon a memorandum for charter, by which it was stipulated on the part of the owners that the ship should sail to Liebau, and

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And it seems that the king, in such an instance, may enforce the contract for the benefit of the crown.

Where a foreign ship is chartered in England by a British subject with the usual exception "against restraints of princes," and performance of the voyage is prevented by an embargo laid by the British government on ships of that nation, a British subject is discharged from his contract.

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But if in the case of a charter party between two British subjects, events occur at a foreign port to prevent the freight or from furnishing a loading which he has contracted to do, the contract is not dissolved but the breach must be answered in damages. Although plaintiff may be allowed de

demurrage by there load, from the factors of the defendant, a full cargo of barley, and proceed therewith to Berwick, and deliver the same, on being paid freight, &c. The ship was to be allowed to remain on demurrage ten days over and above her running or lay days, at 3*l*. per diem. On her arrival in Liebau roads, the captain was informed by the factors of the defendant that the Russian government had prohibited the exportation of barley, and that it was therefore out of their power to furnish the intended cargo. The captain, however, entered the port, and, after continuing there 49 days, returned in ballast to Berwick. The action was brought to recover freight charges and ten day's demurrage. *Per Cur.* If a man undertakes what he cannot perform, he shall answer for it to the person with whom he undertakes. The plaintiff is therefore entitled to recover the freight and charges; but with respect to the demurrage, as it appears that notice was given before the captain entered the port that the factor could not furnish a cargo, there is no pretence for making the defendant liable to that charge. See 2 Vern. 212.

10. *De METTON AND ANOTHER v. De MELLON*, H. T. 1810, 2 Campb. 420. In *assumpsit* it appeared that a Frenchman and a Swiss had entered into partnership at Lisbon, and domiciled; they sent merchandize, during the war, to Nantes by a Portuguese vessel. The documents respecting the property were made out in the name of the defendant, a Portuguese, as a "neutralizer." The vessel was captured, and libelled in the Admiralty Court; the defendant, by the orders of the plaintiffs, instituted their claim, and the merchandize was restored to the defendant, as the cargo of a Portuguese. The plaintiffs then brought this action against the defendant for the proceeds of the merchandize. *Per Lord Ellenborough.* As the facts were misrepresented to the Admiralty Court, and it is impossible to say what decision would have been given, if they had not been deceived, I am of opinion that this action cannot be maintained, as the plaintiffs have declared that the cargo is the property of the neutralizer.—Plaintiffs nonsuited. See 2 East, 234.

11. *WILLISON v. PATTISON*, E. T. 1817, C. P. 7 Taunt. 439; S. C. 1 Moore, 183. *Per Cur.* A contract with an alien enemy in time of war cannot be enforced upon the return of peace, in a British court of judicature, although the plaintiff be an English born subject, resident in the hostile country. There can be no such thing as a war for arms, and a peace for other purposes. See Vattell. b. 3. c. 5. s. 70.

subject resident in a hostile country cannot, upon the return of peace; recover in a British court upon contracts entered into in that country by him in time of war.

[482] III. OF THE PLEADINGS* & EVIDENCE CONNECTED WITH.

1. *ORD v. HOWARD*, E. T. 1696, K. B. Mod. 125. *Per Cur.* If you plead alienage in bar, you must lay a place where he is born; but if in abatement, it is triable where the action is brought. *Vide ante*, 11 & 63.

2. *PROGERS v. ARTHUR*, E. T. 1692, K. B. 3 Salk. 28; *BRODECK v. BRIGGS*, H. T. 1691, K. B. Carth. 265. *NICHOLS v. PAWLETT*, E. T. 1693, K. B. Carth. 302.

In an action of *assumpsit*, the defendant pleaded that the plaintiff was an alien enemy, born at Roan, in France, under the allegiance of, &c. The plaintiff replied that he was born at Hamburg, under the allegiance of the emperor, a friend of the king, &c. and traversed that he was born at Roan, in France, &c. Upon demurrer, the defendant had judgment, because, by the traverse, Roan is made parcel of the issue, which is immaterial; the plaintiff should have traversed that he was born under the allegiance of the French king. See 22 Ass. 25; 11 H. 4. 36; 3 Salk. 28; Sid. 357.

3. *WEST v. SUTTON*, E. T. 1702, K. B. 2 Lord Raym. 853; S. C. 1 Salk. 2; *Holt*, 3. S. C. *GEORGE v. POWELL*, T. T. 1717, K. B. Forts. 221.

A *scire facias* was brought on a judgment in assize, for the assize of march; the defendant pleaded in abatement that the plaintiff was an alien

* Alien enemy may be pleaded in abatement (*vide ante*, p. 10,) or in bar; but as the Court will not in general allow a defendant to plead alien enemy with another plea; see 1 B. & B. 222; 2 B. & P. 72; 12 East, 806; 10 East, 326; it is in general advisable to plead

Semb. In a plea in bar the place of the alien's birth must be stated;

Though that allegation is not traversable.

The replication should conclude with a verification.

enemy, *et hoc*, &c. Plaintiff replied he was a subject born, viz. at such a place in England, *et hoc paratus est verificare*. Defendant demurred; and Per Holt, C. J. The plaintiff should have concluded to the country; for where alien is pleaded in abatement, it is triable where the writ is brought, for which reason the replication must conclude to the country; *aliter* where alienee is pleaded in bar; in that case, the replication must conclude *et hac paratus est verificare*.

4. SYLVESTER'S CASE, H. T. 1701, K. B. 7 Mod. 150; S. C. Forts. 221. S. P.

GEORGE V. POWELL, T. T. 1717, K. B. Forts. 221.

Though an alien under the queen's protection be enabled to sue, yet if he bring's an action, and alienage is pleaded against him, whether his protection be special or general, he ought to reply it.

5. TEXEL V. HOOPER, M. T. 1695, K. B. Comb. 394.

Per Holt, C. J. Where alienee is pleaded in bar, the plaintiff must take issue.

6. BRANDON V. NESBITT, M. T. 1794, K. B. 6 T. R. 23.

Assumpsit on a policy of insurance, of goods on board an American ship, at and from London to Bayonne, in France, there was an averment in the declaration that the policy was effected for the benefit and on the account of certain persons therein named, who were interested in the goods, and another averment that the ship was captured as a prize. The defendant pleaded "that the persons interested in the goods were aliens, born in foreign parts, to wit, Bayonne, in France, out of the allegiance of the king of Great Britain, and within the allegiance of a foreign sovereign, to wit, the French king." That on behalf before the ship sailed, a public and open war was commenced, and was carried on between our king and the persons exercising the powers in France; and that the persons interested were inhabiting and commorant in France, under the government of the persons exercising the powers in France, and that they are enemies to our king, and adhering to the king's enemies, &c. There was another plea, in which it was alleged that the persons were living in France and enemies (without saying they were enemies born) and that the goods were sent from London after the commencement of the war, for the purpose of being landed and delivered in France, in the course of trade, to the king's enemies, &c. The replication to the first plea stated, that the persons interested in the insurance were, before the commencement of the suit, severally and respectively indebted to the plaintiff in divers sums of money, exceeding the respective interests of those persons in the goods insured, specifying what sum was due to the plaintiff from each of those persons respectively. The replication to the second plea stated that the exportation of goods insured, which consists of muslin, &c. was not prohibited by any law at the time of the policy, and that they were put on board the ship before the commencement of the war, for the purpose of being carried on the said voyage, &c. To these two replications there was a general demurrer and joinder in demurrer. The Court were of opinion that judgment must be for the defendant, on the ground that an action would not lie either by, or in favour of, an alien enemy. See 8 T. R. 71, 166, 548; B. & P. 348; 3 id. 194; 1 Marsh. 158; 1 Camp. 75; 4 East, 396; ante, p. 11.

7. SIMEON V. THOMPSON, M. T. 1798, K. B. 8 T. R. 71.

Under a judge's order to "pleaded issuably," the defendant pleaded; 1st. The general issue. 2d. That the plaintiffs were alien enemies. The plaintiff treating the latter plea as a nullity, signed judgment as for want of a plea. On a rule to show cause why that judgment should not be set aside, *Per Cur.* The judgment in this case has been properly signed. The construction to be put on the term "pleading issuably" is not merely pleading a plea on which issue may be joined, but such an one as goes to the merits. Now as we are of opinion that this plea is put in purely for delay, and that it does not touch the merits, the rule must be discharged. See 7 T. R. 530; Barnes, 263; 1 Burr. 59; 1 Tidd. 484; 7th ed.

alien enemy in abatement; and where the plaintiff was not an enemy at the time the contract was made, as the right is only suspended, the plea must be in abatement. See 15 East, 260; 3 Campb. 182.

And if the plaintiff be under the king's protection he should reply it.

[483] Issue must be joined under the plea of alien enemy. To an action brought by an agent of an alien enemy, it cannot be replied that the object of the suit was, that the agent might, with the proceeds, pay himself a debt due to him from the alien.

Alien enemy under a judge's order to plead issuably, is not an issuable plea.

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If a plain-
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suit, and
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But, altho'
the latter
form is in-
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the Court
are bound
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to give judg-
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plaintiff, if
it appears
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whole re-
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has no right
to sue.

Judgment
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The plea of
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plea of alien
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Or where
the general
issue and a
lien enemy
were jointly
pleaded.

8. *LE BRIT V. PAPILLON*, H. T. 1804, K. B. 4 East, 502.

The plea in this action averred that the plaintiff ought not to have or maintain his aforesaid action against the defendant, because the plaintiff is an alien born in foreign parts, and that before, and at the time of exhibiting his bill in this behalf, he was, and now is, inhabiting and commorant in France, under the government of the persons exercising the powers of the government in that country between whom and our said lord the king a public war has been commenced, and is now carried on, &c; wherefore he prays judgment, if the plaintiff ought to have or maintain his aforesaid action against him in this behalf. The plaintiff, in his replication, said that he ought not to be barred, &c. because at the time of exhibiting of his said bill against the defendant, and afterwards, as well he, the plaintiff, as the said persons then exercising the powers of the government in France, were at peace and in amity with our said lord the now king, &c. and this &c. whereof, &c. To this defendant demurred, inasmuch as the matter alleged in the plea, viz. that the plaintiff, at the time of plea pleaded, was an alien born, and had not been answered, but that the plaintiff had attempted to put in issue; that, at the time of exhibiting his bill, he was an alien enemy. Joinder in demurrer *Per Cur.* It appears upon the whole of this record, that although the plaintiff is now an alien enemy, yet that he was not such at the time of exhibiting his bill. As a right to sue was well vested in the plaintiff at the time of the action brought, the plaintiff's disability ought to have been pleaded in the form in which pleas after the last continuance are generally pleaded, viz. that the plaintiff ought not further to have or maintain his action. It may be considered as a settled rule of pleading, that no matter of defence, arising after action brought, can properly be pleaded in bar of the action generally. But the Court may and ought to give such judgment on the whole record as ought to be given, without regard to the issues found, or to any imperfection in the prayer of judgment. The judgment, therefore, is, that the plaintiff be barred from further having and maintaining his action. See 2 Str. 1055; Rep. Temp. Hard. 345; Winch. 75; 8 Co. 93; Plowd. 66; Doug. 106, 112; Forts. 338; Salk. 178, 338; 2 Lutw. 1177; Co. Litt. 129, b; 5 Com. Dig. 87; Plead. F. 4; 1 T. R. 125; 3 id. 23; 8 id. 166.

9. *VENBREYEN AND OTHERS V. WILSON*, H. T. 1808, K. B. 9 East, 320.

A motion was made that judgment and execution should be stayed in this case on bringing the money recovered by the verdict into court, provided it should be deemed necessary, upon the ground that the plaintiff's had, since the verdict, become alien enemies. No case was cited; but it was said that in all instances where an *audita querela* would lie, the Court were in the practice of conceding summary relief. *Per Cur.* If the defendant has any such remedy, he may avail himself of it, if advised, but we cannot interfere in the manner proposed. Rule refused. See 1 Salk. 93.

10. *TRUCKENBRODT V. PAYNE*, H. T. 1810, K. B. 12 East, 206.

The defendant pleaded to an action for an assault and false imprisonment; 1st. General issue. 2d. That the plaintiff was an alien enemy. 3d. That the plaintiff having committed a felony, the defendant gave him in charge of a constable, to be taken before a magistrate. The plaintiff obtained a rule, calling upon the defendant to show cause why the rule before made for pleading several matters should not be discharged, on the ground that a plea of alien enemy could not be pleaded with other matter. *Per Cur.* It is the practice, both in the Common Pleas and in this Court, not to allow the plea of alien enemy to be pleaded with other defences inconsistent with it. The defendant, may, however, elect which of the special pleas he will abide by.—Rule absolute.

11. *ANGERSTEIN V. VAUGHAN*, H. T. 1798, C. P. 1 B. & P. 222, n.

A rule, obtained to plead several matters, viz. 1st. The general issue, and 2dly. Alien enemy to a declaration on a policy of insurance, was discharged by the Court.

12. *THYATT v. YOUNG*, H. T. 1800, C. P. 2 B. & P. 72. *S. P. FERON v. LADD*, Or non as sumptit, and alien enemy. M. T. 1779, C. P. 2. Bl. 1326.

Per Cur. We can in no case allow a plea of alien enemy, and other plea inconsistent with that defence to be pleaded together. The instances cited as Alien ene to pleas of infancy and coverture are inapplicable, and do not support the my cannot claim to the right of pleading *non assumpsit* and alien enemy. be given in

13. *HARMAN AND OTHERS v. KINGSTON*, M. T. 1811, K. B. N. P. 3 Campb. 153. evidence un der the gen eral issue;

To an action on a policy of insurance the defendant pleaded the general issue, and tendered evidence to show that the parties interested had become alien enemies since the loss; but Lord Ellenborough, C. J. was of opinion that it was no bar to the action, since it should have been pleaded in abatement, and if it be pleaded because, if the parties interested became aliens since the loss, it did not extin- the party guish their right, but merely suspends the remedy. Besides, upon a defence was born in an hostile which extends to the disability of the person, the strictest proof is required; state, and here is no such proof; no evidence has been given where the parties were the sided in an action was brought.—Verdict for the plaintiff. And upon a motion for a new enemy's country at the time the trial, the Court acquiesced in the opinion delivered by Ellenborough, C. J.— action was brought, is Rule refused.

14. *FLINDT v. WATERS*, E. T. 1612, K. B. 15 East, 260.

Per Cur. The objection that the alien principal (on whose behalf the British agent is suing in his own name) has become an enemy since the agent's right ble. to sue on this contract accrued cannot be proved under the general issue. The [486] defence of alien enemy must be according to the nature of the transaction out Or the fact of an alien on whose behalf a perpetual bar; or the objection may be purely personal in respect to the capacity of the party to sue upon it. As the matter is pleaded at present it operates as a British perpetual bar, whereas the present plea is of a temporary nature. During the agent is su ing having become an enemey since the no legal disability in the plaintiff on the record. See 6. T. R. 23. 35; 4 East, completion of the con tract, can not be ta ken advan tage of un der the gen eral issue. 410. 502; 8 id. 273.

15. *MARGARET ALCIATOR v. SMITH*, T. T. 1812, K. B. N. P. 3 Camp. 244.

The endorsee of a bill of exchange brought an action against the drawer, to which the latter pleaded alien enemy, and the former replied that she resided here under a licence from the king. Upon issue joined, it appeared that the plaintiff, who was a natural born subject of France, had, upon arriving in this realm, where she had resided many years, obtained a licence under the 38 Geo. 3. c. 77, and in consequence of the 43 Geo. 3. c. 155. she had subscribed her place of abode at one of the police offices, but having obtained no new licence, this action was commenced. Per Lord Ellenborough, C. J. This licence was granted by virtue of an act of parliament, and not by virtue of the king's prerogative; consequently, when the statute expired, the licence by evi dence of a licence granted un der a tem porary stat ute since 163.

Alienation. See tit. *Bankrupt; Baron and Feme; Corporation; Copyhold; Covenant; Forfeiture; Infant.*

Alimony. See tit. *Baron and Feme.*

Allegiance.* See also tit. *Denization and Naturalization; Supremacy, Oath of; and tit. Oaths; and Lord Raym. 445; Skin. 11; 2 Lutw. 909; Co. Litt. 129. o: Calvin's case, 744; 1 Com. Dig. Allegiance, 3 Burn's Just. Oath.* [487]

* Ligeance is derived a *ligando*, being the highest and greatest obligation of duty and obedience that can be. Legiance is the true and faithful obedience of a liegeman or sub-

REX v. R. FULLER, 1797, Old Bailey, 2 Leach. C. L. 790; S. C. 1 East, P. C. 92.

An indictment on the 37 G. 3. c. 70. for endeavouring to seduce any soldier from his allegiance, need not state how and by what acts he endeavoured to effect his purpose, nor that the prisoner knew the person he was seducing to be a soldier.

This was an indictment on the 37 Geo. 3. c. 70. which enacts, that any person who shall maliciously and advisedly endeavour to seduce any person, serving in his majesty's forces by sea or land, from his duty and allegiance to his majesty, shall on being legally convicted of such offence, be adjudged guilty of felony, without benefit of clergy. It contained two counts; the first, that the prisoner being, &c. did feloniously, maliciously, and advisedly endeavour to seduce one M. L. to become a deserter, whilst in his majesty's service, and from his duty and allegiance, contrary to the form of the statute. The second count was similar to the first, alleging that the prisoner did, &c. endeavour to excite the said M. L. to commit an act of mutiny, and to act traitorously and be guilty of mutinous practices, contrary to the form of the statute. At the trial it appeared that the prisoner was a private in the Buckinghamshire Supplementary Militia, and that M. L. was a private in the Coldstream Guards: and upon the facts alleged in the indictment being clearly proved, the jury found the prisoner guilty; but the judgment was respited on three grounds; 1st. That the first count ought to have shown how the prisoner endeavoured to seduce M. L. from his duty and allegiance. 2d. It ought to have averred that the prisoner knew M. L. to be a soldier. 3d. That the second count is defective, as it contains two several charges; 1st. An endeavour to seduce M. L. to be mutinous. 2d. An endeavour to entice M. L. to commit traitorous and mutinous practices. After argument, The judges were of opinion, 1st. That an endeavour to entice is a conclusion of fact arising out of a multiplicity of circumstances, which is not capable of any precise definition; consequently the offence is fully comprehended by the term "endeavour." 2d. That the charge necessarily includes privity; but, as a more comprehensive answer, we are of opinion that the word advisedly is equivalent to the word knowingly; therefore this objection is as groundless as the first. 3d. We are of opinion, that as the prisoner stands convicted upon the first count of this indictment, to which no valid exception has been taken, and upon which judgment must be pronounced, it is unnecessary for us to decide upon the tenability of the other objections. See 3 T. R. 98; Rex v. Middleton, 6 T. R. 379; Rex v. Stirling, 1 Leon. 125; Tremaine, P. C. 168; Sanchar's case, 9 Co. 116; Cro. Cir. Comp. 586; Cro. Cir. Assistant, 392; Rex v. Kinnersley, 1 Stra. 193; 2 Hawk. P. C. c. 25. s. 11; Davy v. Baker, 4 Burr. 2471; Rex v. Mason, 1 Leach. 487; Rex v. Munroe, 2 Stra. 1127.

Alliance. *Vide tit. Prerogative.*

ject to his liege lord or sovereign. *Ligeantia est vinculum fidei; ligeantia est levis et sentia.* See Co. Litt. 129. a; Macdonald's case, Fort. 59; Dy. 300. b; Cro. Jac. 530; Hob. 271; 2 Ro. Rep. 95. The duty of allegiance, whether natural or local, is founded in the relation which the person stands in to the crown, and in the privileges which he derives from that relation. Local allegiance is founded in the protection a foreigner enjoys for his person, his family, and effects, during his residence here; and it ceases whenever he withdraws with his family and effects. Natural allegiance is founded in the relation in which every man stands in to the crown, considered as the head of that society whereof he is born a member, and on the peculiar privileges which he derives from that relation, which are with great propriety called his birthright. This birthright nothing but his own demerit can deprive him of; it is indefeasible and perpetual; and consequently the duty of allegiance, which arises out of it, and is inseparably connected with it, is, in consideration of law, likewise inalienable and perpetual. Forst. C. L. 183. By statute 1 Geo. 1, stat. 2, c. 13, s. 11, two justices may summon, by writing under hand and seal, any person whom they shall suspect to be dangerous or disaffected to the government, to appear before them at a certain day and time therein to be appointed, to take the oaths of allegiance, supremacy, and abjuration; and if such person neglect or refuse to appear, then on due proof made on oath of the summons having been served on such person, or left at his dwelling-house, or usual place of abode, with one of his family there, they shall certify the same to the next sessions, there to be recorded by the clerk of the peace; and if such person shall neglect or refuse to appear and take the oaths at the said sessions (the name of such person being publicly read at the first meeting of the said sessions), then such person shall be esteemed and adjudged a popish recusant convict, and the same shall be thence certified by the clerk of the peace into the Chancery or King's Bench, to be there recorded. See also the statutes 13 Co. 3. c. 6; 1 Ann. st. 1, c. 22; 3 Ann. c. 8; 6 Ann. c. 7; 8 Geo. 2, c. 26, s. 4; 16 Geo. 2, c. 30, s. 3; and Chit. jur. on the Prerogatives of the Crown, 15 to 26.

Allocatur of Master or Prothonotary. See tit. *Arbitration; Attachment; Attorney; Costs.*

1. **ALGER v. HEFFORD**, M. T. 1807, C. P. 1 Taunt. 38.

Upon changing attorneys, an order had been obtained for taxing the bill of the attorney who had been first employed, directing him to deliver up all papers, &c. On the back of the order the prothonotary, according to the usual practice, endorsed his *allocatur*. A rule was afterwards obtained to show cause why the attorney originally employed should not have the order, and *allocatur* endorsed thereon delivered over to him. The rule was made absolute; the Court observing, that he was entitled to the possession of it for the purpose of enforcing payment of his bill.

2. **FOSTER v. COMPTON**, E. T. 1818, 2 Stark. 364.

This was an action for the recovery of a moiety of damages and costs, recovered against the plaintiff and defendant in a prior suit, in which they had been jointly sued, but which they defended by separate attorneys and by different counsel. The plaintiff had both paid the whole amount of the damages and costs, and now produced the *postea*, in evidence, with the master's *allocatur* in support of his claim. Abbot, J. considered the evidence sufficient as to the damages, but not enough to entitle the plaintiff to recover his moiety of the costs without producing judgment. See Bul. N. P. 234; [489] Willes. 367; 2 Esp. 647. 649. n.; 1 Stra. 161; 6 Esp. 83; 9 Price, 359.

3. **FRY v. MALCOLM**, M. T. 1814, C. P. 4 Taunt. 705.

The defendant had been arrested in an action founded on the prothonotary's *allocatur* for the amount of the costs, taxed for him under a rule of court. A motion was made for discharging the defendant on entering a common appearance, which was afterwards made absolute; the Court being clearly of opinion, that even if the action was sustainable at all, the defendant ought not to have been holden to bail. The case of *Smith v. Whalley*, 2 B. & P. 484, where the Court says that the general rule is clear that the mere order of another court is not a good ground of action, was deemed a conclusive authority with reference to the present application. See *Emerson v. Lashley*, 2 H. Bl. 248; *Carpenter v. Thornton*, 3 B. & A. 52.

Allotment. See tit. *Common; Inclosure.*

Allowance. See tit. *Bail; Bankrupt; Certiorari; Error; Habeas Corpus; Prisoner; Sheriff.*

Almanack.

(A) COPYRIGHT, IN WHOM VESTED, p. 489.

(B) WHEN AND OF WHAT EVIDENCE, p. 490.

(A) COPYRIGHT IN, IN WHOM VESTED.

STATIONERS' COMPANY v. CARNAN, E. T. 1775, C. P. 2 Bl. 1004. S. P. THE SAME v. SEYMOUR, T. T. 1676, 1 Mod. 256; S. C. 3 Keb. 792. THE COMPANY OF STATIONERS v. PARTRIDGE, M. T. 1711, K. B. 10 Mod. 105.

By letters patent, reciting other letters patent, whereby there had been a grant to the company of stationers, and their successors for ever, giving them power, privilege, and authority to print, or cause to be printed, all manner of almanacks and prognostications whatsoever in the English tongue, and all manner of books and pamphlets tending to the same purpose, being allowed by the Archbishop of Canterbury and Bishop of London, or one of them, with strict commandment and prohibition to all other printers, &c. not to print, buy, sell, or utter any other than should be printed by the said company, which last mentioned letters were then surrendered to and accepted by the king, who afterwards gives and grants full power, authority, privilege, and licence to the said company, and their successors for ever, *inter alia* to print or cause to be printed all manner of almanacks and prognostications whatsoever.

* The validity of these grants had been admitted in courts of equity, who, on several occasions, granted injunctions to protect the patentee's right from infringement. See *Stationers' Company v. Lee*, 2 Ch. Ca. 66; Same v. Wright, id. 76; Same v. Partridge, 2 Bro. P. C. 187. Toml. Ed.; and *Godson on Patents and Copyright*, 239.

ever in the English tongue, and all manner of books and pamphlets tending to the same purpose, which are not to be taken and construed other than almanacks or prognostications, being allowed by the Archbishop of Canterbury and Bishop of London, or one of them, for the time being, by what names or titles soever the same may be called, or shall be printed within the realm of England, with clauses prohibiting all other persons to print, buy, vend, or utter the same, under forfeitures and penalties therein mentioned. The defendant, subsequent to the grant of the letters patent, printed an almanack or prognostication, entitled "A Diary for the Year of our Lord 1771," and uttered and sold many copies, the plaintiffs filed their bill in Chancery against him, waving all penalties, and praying an account of the profits of the several copies sold, and to have the rest delivered up for an injunction. The latter was granted, of course, till answer and further order. The defendant put in answer, insisting that the plaintiffs had no such exclusive right as claimed by the bill; and on showing cause why the injunction should not be dissolved, a case was stated by order of the Chancellor for the opinion of the Court of Common Pleas, and, after two arguments, that Court certified their opinion as follows: "Having heard counsel on both sides, and considered the case, we are of opinion, 1st. That the grant made to the plaintiffs, the Stationers' Company, was restrained to such almanacks and prognostications as should be licenced or allowed by the Archbishop of Canterbury and the Bishop of London, or either of them for the time being. 2d. We are of opinion that the crown had not a prerogative or power to make such grant to the plaintiffs, exclusive of any other or others." See 1 Mod. 256; 2 Keb. 731; Moor, 674; Darcy v. Allen, 3 Mod. 76; 9 Hen. 7. pl. 14; 2 Chan. Cases, 76; Carter, Rep. 89; 3 Keb. 792; 2 Show. 258; Lill. Ent. 63; Skin. 233; 2 Bro. P. C. Toml. Ed. 137; 1 Lord Erskine's Speech in 1 vol. coll. of his speeches, p. 42. &c.

(B) WHEN AND OF WHAT EVIDENCE.*

1. THE QUEEN v. DYER, M. T. 1703, K. B. 6 Mod. 41; S. C. 1 Salk. 181; Holt, 157; S. P. HARVEY v. BROAD, T. T. 1703, K. B. 6 Mod. 196. HOYLE v. CORNWALLIS, E. T. 1781, K. B. 1 Stra. 886; S. C. Forts. 373.

The almanack is part of the law of the land.

Per Cur. The almanack is part of the law of England, of which the Court must take judicial notice. See 6 Com. Dig. Temp. b. 2.

2. HARVEY v. BROAD, E. T. 1703, K. B. 6 Mod. 59.

And the Court will be governed by it, as to the terms being moveable or not.

Per Cur. The calender is law, of which we, as judges, must take notice. The distinction that we ought to take notice of immoveable but not of moveable feasts, is untenable, for we know neither one nor the other, but by the almanack. See 1 Rol. Ab. 524. c. pl. 4; 2 Lev. 176; Latch. 11. 118; 1 Sid. 307; Dyer, 181; 1 Lord Raym. 329; Cro. Jac. 548; Rep. Temp. Hard. 162; 1 T. R. 116.

3. BROUGH v. PERKINS, T. T. 1702, K. B. 6 Mod. 81; S. C. 2 Lord Raym. 992; S. C. 1 Salk. 131; Holt, 121. S. C. S. P. DAVY v. SALTER, M. T. 1703, K. B. 6 Mod. 251.

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The almanack or calender upon which the courts proceed, is that annexed to the common prayer book.

In this case an exception was taken to the execution of a writ of inquiry, viz. that the writ was returnable on such a day in fifteen days of St. Martin, and the inquisition is by virtue of the writ, &c. returned in fifteen days of St. Martin last past, which must be a year before, viz. Martinmas twelvemonth; and St. Martin is a fixed feast, and always on the 11th of November. *Per Holt, C. J.* We take notice of all feasts, and the almanack is part of the common law, the calender being established by act of parliament, and published before the common prayer-book, consequently the almanack affixed thereto is good evidence.—Judgment affirmed.

* See 2 & 3 Edw. 6, c. 1; 5 & 6 Edw. 6, c. 1; 1 Eliz. c. 2; 24 Geo. 2, c. 23; 25 Geo. 2, c. 30; 26 Geo. 2, c. 34. Whether a particular day of the month was on a Sunday or not is triable by the country or the almanack; Fish v. Brohet, Dy. 182, pl. 55; and in Page v. Fancett, 1 Leon. 242; it was held that the Court might judicially take notice of almanacks; and in Galery v. Banbury, Cro. Eliz. 12, that an examination by almanacks is suf-

Alteration. See tit. Amendment; Bill of Exchange; Bond; Insurance; Reward; Stamp; Variance: Vendor and Purchaser; Witness.

Ambassador.* See tit. Consul; Prerogative.

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I. OF HIS PRIVILEGES, AND TO WHAT MINISTERS THEY [492] EXTEND.

1. CASE OF ANDREW ARTEMONOWITZ MATTUEOF, the Russian Ambassador, T. T. 1701, K. B. 10 Mod. 4.

The question was whether an ambassador could by law be arrested for debt; for the defendant it was argued, that if the public privileges of an ambassador were allowed to be invaded for the mere preservation of the property of private *Semb. An ambassador at common law is privileged from arrest.* a friend, and a trial *per pais* not necessary, although it be assigned for error that the day on which judgment was given was on a Sunday. See 1 Leon. 328, 242.

* An ambassador is a person delegated by one sovereign to another to treat upon affairs of state. 4 Inst. 153. The English constitution has vested in the king the sole power of sending ambassadors and other ministers abroad, and receiving the representatives of foreign states. 1 Bl. Com. 253. The right of sending ambassadors is confined to those potentates who have sovereign authority. 4 Inst. 153. Grotius De Jure, b. and p. 1, 2, c. 18; and the privilege cannot be exercised by a subject, however powerful; Moll De J. Mar. 129; or a viceroy; or by one who was formerly a sovereign, but is now deprived of his regal attributes: Moll. De J. Mar. 130; Gro. De J. b. & p. 1, 2, c. 18, § 2. But the Hans towns and other free imperial cities; Moll, De J. Mar. 129; or independent states, or any that are in part subject and in part sovereign, *pro parte qua non sunt subditi*, are equally competent to preserve an international communication, through the medium of ambassadors; Gro. D. J. l. & p. 1, 2, c. 18, § 2. A person sent by a sovereign with letters of credence to another is an ambassador, though he be named only envoy or agent; 4 Inst. 153; but it seems he need not be appointed by letters patent, or by any other particular instruments though they universally receive, on their appointment, some document evidencing their right to fill the situations assigned to them. Chit. jun. on the Prerogatives of the Crown, 40. If the party delegated be not received or admitted as an ambassador, he has no privilege as such; Moll. De J. Mar. 130; Gro. De J. b. & p. 1, 2, c. 18, § 2, or if he continue after the time limited for his departure; Marshall v. Critico, 9 East, 447; or is refused to be recognized by the sovereign to whom he is sent; Gro. De J. b. & p. 1, 2, c. 18 § 3; Moll, De J. Mar. 131. A plenipotentiary, notwithstanding the death of his sovereign, still continues to be the minister of the nation he represents, and as such is entitled to enjoy all the rights and honors annexed to that character. It is his duty to remain in the country to which he has been sent until the pleasure of his new prince be known. If he be recalled or dismissed, though his functions cease, his rights and privileges do not immediately expire. He retains them until his return to his sovereign, to whom he is to make a report of his mission. Vattel. b. 4, c. 9, § 126.

An ambassador committing a crime *contra jus gentium*, it has been said, shall be punished as another alien without being remanded to the state he represents; 4 Inst. 153; 1 Rol. 175; but Mr. Justice Foster (Crown Law, 187,) observes that an ambassador can at worst be considered as an enemy subject to the law of nations, never as a traitor subject to our municipal laws, unless perhaps, in case of attempts directly and immediately against the life of the king. See the King v. Owen, Roll. Rep. 185, pl. 17. To preserve inviolate the security and independence of public functionaries sent from one state to another, all foreign jurists concur in the opinion that neither an ambassador nor any of his suite can be sued for any debt or contract in the courts of that kingdom wherein he is sent to reside. The sovereign, by the very act of receiving him, tacitly engages to allow him all the liberty and safety necessary to the proper discharge of his functions, without which the admission of a foreigner or public minister would be nugatory. This principle of the law of nations is recognised and confirmed as part of the municipal law of England. The stat. 7 Ann. c. 12 § 3, declares "that all writs and processes that shall at any time hereafter be sued forth or prosecuted whereby the person of any ambassador or other public minister of any foreign prince or state authorised and received as such by her majesty, her heirs, or successors, or the domestics or domestic servants of any such ambassador or other public minister may be arrested or imprisoned, or his or their goods or chattels may be distrained, seized, or attached, shall be deemed or adjudged to be null and void to all intents, constructions, and purposes whatsoever." But it is added, "that no merchant or other trader whatsoever within the description of any of the statutes against bankrupts, who hath or shall put himself into the service of any such ambassador or public minister, shall have or take any

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individuals, states would be extremely cautious of sending ambassadors to us; and if such a practice were tolerated, ours would experience the same treatment in foreign countries, and few would be prevailed on to assume that character. Should an ambassador be liable to the restraints of the law of the land to which he goes, how easy would it be, on any emergency, to incapacitate him from attending on the business of his sovereign. The person of an ambassador has ever been held sacred and inviolable by the law of nations. The goods of an ambassador are not liable to distress, *a fortiori*, his person should be exempt from physical detention. An ambassador should be petitioned, and, on his refusal to act conformable with justice, sent back to his master. If an ambassador commits an enormous crime, the king from whom he is sent, not the king to whose court he is sent, must punish him. Lord Cole says, to infringe on the liberty of the person of an ambassador is a violation of the law of nations. An ambassador, by fiction of law represents the person of his master; thus Coke, on stat. 25 Edw. 3, affirms it high treason to kill an ambassador. Now certainly no person will say the czar himself could have been arrested. The same fiction of law that makes him represent the person of his master, makes him extra-parochial, and, as it were, in the dominion of his sovereign. The ill-treatment of ambassadors is a thing of highly dangerous consequences, for it may involve the nation in a war, and it would be very inconvenient that this should be in the power of any private person whatever. On the other side it was submitted, that if the law be as stated for the defendant, a subject might be left without remedy for the recovery of his just debts; that justice ought always to be reciprocal; and that as an ambassador might arrest a corresponding power should be conferred on the creditor. It is a maxim in law that the royal prerogative does no wrong; and shall the prerogative of an ambassador be paramount to that of the crown? Such a law as this would be a nullity, because contrary to *Magna Charta*, cap. 29, we will not sell, deny, or delay justice to any one. An ambassador by his contract renounces his privilege so far as to subject himself to the laws in force in that country where the contract was made. The preceding case occasioned the passing of the stat. 7 Ann. c. 12, and the parties concerned in the arrest were committed to prison. Vide Puffendorf, b. 8, c. 9, § 9; 1 Roll. Rep. 175, 185; 3 Bulst. 27; 1 Bac. Ab. Ambassador, 88.

2. *BUVOT v. BARBUT*, cited in *Triquet v. Bath*, 3 Burr. 1481. S. C. Ca. Temp. Talbot, 281.

But not a person described as "agent of commerce." But an envoy is privileged.

Upon a motion to discharge the defendant, who was in execution for not performing a decree, the question raised was, whether an agent of commerce was entitled to the privileges of public ministers; and Lord Talbot was clearly of opinion in the negative.

3. *HEATHFIELD v. CHILTON*, H. T. 1767. K. B. 4 Burr. 2016. S. P. CAIRN v. MOLINEUX, H. T. 1735, C. P. Barnes, 374.

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On an application to discharge the secretary of an ambassador from custody, the affidavit described the diplomatist as a minister from the Prince manner of benefit by this act." The personal chattels of an ambassador cannot be seized on as a pledge, or taken in execution for the payment of a debt, even when sanctioned by the express permission of the king of the state where the plenipotentiary is resident; for he ought to be exempt from all coercion, as well with reference to that which affects his property as his person; if therefore he contracts a debt, he must be applied to by petition, and if he refuses payment, letters of request should be sent to the sovereign by whom he was delegated. Molloy, 141.

* Or a consul. *Buvot v. Barbut*, *supra*; *Clark v. Cretico*, 1 Taunt. 106; *Decerissay v. O'Brien*, Barnes, 375; reported in Ca. Prac. (C. P. 13, by the name of *Decerissay v. O'Brien*; *Vivosh v. Becker*, 3 M. & S. 298, see these cases abridged, post, tit. Consul.

† In *Vattel*, b. 2, c. 2, § 84, it is laid down that in every case it would be sufficient to show that by the law of nations, a party is entitled to this privilege without inquiring whether he is in the strict sense of the word a public minister. But this rule of that profound and ingenious jurist seems incompatible with the practice of our courts, where it is necessary to show, in distinct and positive terms, the manner in which the minister is accredited that he acts as a diplomatic agent for a foreign independent state, that he has exercised the functions annexed to his office, and that his appointment and power are in force at the time of the application for his discharge.

Bishop of Liege. Lord Mansfield intimated that if it had been shown that the applicant's employer had been an envoy, who is in the second class of plenipotentiaries,* he would have been privileged.

4. MARSHALL v. CRITICO. E. T. 1803. K. B. 9 East. 447.

A motion was made to discharge the defendant on common bail. It appeared that he had been delegated a minister from the Porte, but had been dismissed several months from his employment, and another resident here appointed in his room; but that he had not received any official notification of his dismissal, or of the appointment of his successor. *Per Cur.* The defendant is not privileged from being holden to bail. It is only a privilege of the state which he represents, and not a personal privilege.—Rule refused. See Ca. Talb. 381; cited Burr. 1480-1.

II. OF HIS SERVANTS' PRIVILEGES.

(A) WHAT CLASS OF SERVANTS ARE PRIVILEGED.

1. EVANS v. HIGGS. E. T. 1727. K. B. 2 Stra. 797. S. C. less fully reported by the name of EVANS v. HICKS. 2 Id. Raym. 1524. S. P. WEDMORE v. ALVARLEY. 1731 K. B. Fitzg. 200. RE COUNT HASLANEY. DICKINS. 274. S. P. HOPKINS v. DE ROBECK. 3 T. R. 79. TOMS v. HAMMOND. M. T. 1733. C. P. Prac. Reg. 14. *semb contra.*

A motion was made to discharge the defendant out of execution, as being an ambassadors' servant, viz. his English secretary. It was objected that he did not lie in the house, and the words of 7 Ann. c. 12. are, domestic servants, *Per Cur.* The nature of his employment requires his attendance at the house, and it is not necessary he should lie there. And the general words—all writs and processes shall be void, take in this case, and therefore the execution must be set aside.

2. TRIQUET v. BATH. E. T. 1764. K. B. 3 Burr. 1478; S. C. 1 Bl. Rep. 471.

On the part of defendant to obtain his discharge from custody, it was sworn that he was regularly appointed by Count Haslang to be one of his English secretaries, at 30*l.* per annum, for board and lodgings, &c. And he swore to actual attendance and actual service at several times at the count's house, and writing, copying, and carrying several letters and memorials; and in other respects, the defendant's affidavits were so framed, that every thing was sworn that in absolute strictness could be required to bring him within the description of a domestic servant to this minister. On the part of the plaintiff it appeared that Bath had been a mercer in Dublin about seven or eight years before, that he had afterwards been a commissary of stores abroad, and was now upon half pay as such at 15*s.* per day; that he spoke only English; that he had never eat or lodged in the count's house, nor received any wages; but as to the wages it appeared that there were not as yet a half a year's salary due; that whilst he carried on trade in Ireland, he bought goods in England and sold them in Ireland; but this allegation was met by the defendant swearing that he had not traded for seven years anterior to the arrest.—Rule absolute for defendant's discharge.

3. HEATHFIELD v. CHILTON. H. T. 1756. K. B. 4 Burr. 2017. S. P. DARLING v. ATKINS. M. T. 1769. 3 Wils. 33. HOPKINS v. DE ROBECK. H. T. 1787. K. B. 3 T. R. 79.

Per Cur. The registering the name of the defendant in the secretary of state's office, and transmitting it to that of the sheriff's office (mentioned in the fifth section), relates only to the bailiff who arrests the party, and is no condition precedent to the being entitled to the privilege of a public minister's servant.—Rule discharged.

* The following distinctions between the different classes of public plenipotentiaries are it is not necessary to be observed. An Ambassador is invested with the highest authority, acting in all cases as the representative. An Envoy appears only as a simple authority, acting for another but the name not always representing him. A Plenipotentiary is a species of envoy used by courts only should be on the occasion of concluding peace or making treaties. Deputies are not deputed by registered sovereigns, although they may be deputed to sovereigns; they have no power to act or speak but in the name of some subordinate community or particular body. The functions of the first three belong to the minister, those of latter to the agent.

Where a foreign minister continued to reside in the British dominions after the cessation of his official functions for several months, and another person resident here had been appointed his successor, it was held that the foreigner might be arrested, although at the time of the arrest, he had not received any official notification of his dismissal. Every servant *bona fide* employed as the domestic of an ambassador is privileged; [495] Whether he board and lodge in the same house, or be an Englishman or foreigner, or has been in trade seven years prior to the arrest, does not deprive him of its benefits. And to confer the exemption from arrest,

4 *Crosse v. TALBOTT*. T. T. 1723. K. B. 3 Mod. 288. S. P. *TRIQUET v. BATH*. E. T. 1764. 3 Burr. 1478; S. C. 1 Bl. 471. *HEATHFIELD v. CHILTON*. H. T. 1767. K. B. 4 Burr. 2016. n.

But the nominal servant of an ambassador is not privileged.

A motion was made to set aside a bail bond, on an affidavit stating that the defendant was *valet de chambre* to Monsieur Hoffman, the Duke of Holstein's resident here, 12*l.* 12*s.* per annum salary, and 10*s.* a week board wages, and a certificate thereof was produced under the resident's own hand; but it did not appear that he either lodged in the house, or actually executed the office. *Per Cur.* He must be a domestic servant, and really execute the duty of his office, in order to entitle him to this privilege; and being a mere nominal servant is not sufficient.—Rule discharged.

Hence a colourable retainer for the purpose of protection from arrest will not avail. Therefore where a physician accepted a temporary salary, and ostensibly abandoned his practice, but continued to live in an expensive manner, the Court held that it was a fictitious and colourable appointment and not within the exemption.

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5. *LOCKWOOD v. DR. COYSGARNE*, E. T. 1765. K. B. 3 Burr. 1675.

It appeared from the affidavits that the defendant had been formerly protected by the Morocco ambassador, but upon his departure from England, the plaintiff proceeded against the defendant, the latter being then unprotected and obtained judgment against him. The defendant brought a writ of error; and while it was pending; he was hired to the Bavarian minister as his physician, at a salary of 40*l.* a year, though another person appeared on the list as his physician. The defendant swore that he had prescribed to some of the minister's servants, and that since his appointment he never gave his advice to any but the count's domestics. On the part of the plaintiff it was shown that the defendant kept a carriage and livery servant; that he had formerly been a trader, but had retired from business. It was not, however, ascertained where, or for how long time, he had practised as a physician. Soon after he was hired to the secretary of the Bavarian minister, he had communicated to the sheriff of Surrey (who had an execution against the defendant) that he was protected by the minister; the question was whether this was a *bona fide* service, or merely colourable. *Per Cur. Binkershoeck de fro legatorum*, says, "that a person in debt cannot be taken into the service of a foreign minister, in order to protect him;" and were it otherwise, it would give the foreign minister a power to dispense with the private debts, of the subjects of this country; now here was actually judgment against the defendant, only suspended by writ of error; and the secretary's letter says, that this man was protected by the minister. But a foreign minister cannot protect by way of screening a debtor from paying his just debts; he has no such privilege; and it would be of very bad consequence if protections should be set up to sale, or made use of merely for the sake of exempting people from the payment of their just debts. It is not usual to retain physicians; domestic physicians are not the custom of modern ages, though it was customary among the ancients. The profession of a physician is honorary, and the retainer should come from the ambassador, whereas this man offered himself, and it is plain enough that it was done with a view to this protection; but an ambassador cannot protect, it is the law that gives the protection; and yet here the secretary sends notice to the sheriff that the minister has protected him; the view therefore is manifest, it is not a *bona fide* service, but a scheme to secure the defendant from the payment of his debts.—Rule discharged, but without costs.

6. *DARLING v. ATKINS*. M. T. 1770. K. B. 3 Wils. 33.

The party claiming the privilege must not combine two distinct characters and fulfill two separate capacities, as secretary to an

The plaintiff had sued out a writ against the defendant, directed to the sheriff of Middlesex, on which he was arrested, and carried to the officer's house. The envoy from the Elector of Bavaria and from the Elector Palatine sent a message to the officer, demanding the defendant's discharge, as being the envoy's English secretary, and registered as such in the proper offices. In consequence of this message, and on receiving a note of indemnity, the officer discharged the defendant out of custody. The plaintiff subsequently served the sheriff with a rule to return the writ. On a motion to discharge the rule, it appeared by affidavit that although the defendant might be secretary to the envoy, yet he was in fact the purser of the king's ship, and that the duties of those two offices were incompatible with each other. *Per Cur.*

We are bound to discharge the rule upon the sheriff, and disallow the protection. Courts of law will protect the ambassadors or public ministers of foreign princes or states, and their servants, from being arrested; the law of nations and sound policy require it; yet we must not confound the right of protection with the abuse of that privilege; the question is whether this defendant is *bona fide* a servant of the ambassador? It has been already determined that he need not be a domestic, although the words of the statute 7 Ann. c. 12. are "domestic servants," for many houses are not large enough to contain and lodge the whole establishment of some ambassadors. But we are of opinion that the office of purser, which the defendant has and enjoys, is inconsistent with being secretary to an ambassador; for no man can serve two masters; and as the defendant is a servant to the king, he cannot be a servant to the ambassador.

7. *TOMS V. HAMMOND*. M. T. 1733. C. P. Pr. Reg. 14; S. C. Barnes. 370.

Defendant moved to be discharged as a domestic or menial servant of Baron Hopman, envoy from the Duke of Mecklinburgh, and obtained a rule nisi. Plaintiff showed cause that defendant had an annuity of 200*l.* a-year, and that he was a justice of the peace for Middlesex; that it was not probable he would act, as the envoy's certificate described him as a menial servant; nor were such servants within the act, the words of the statute being domestic servant. *Per Cur.* The word menial is not explained by our law; "domestic servant" are the words of the act, and it does not appear that defendant was such. A menial servant may be employed out of the house on household affairs, a domestic in or about the house only; A person hired as a clerk is no domestic servant. Defendant does not appear to have received wages. Let the rule be discharged.

8. *DE CERISSAY V. O'BRIEN*. M. T. 1736. C. P. Ca. Prac. 134; S. C. Barnes, 375.

On motion to stay proceedings against the defendant, he being a courier in the service of T. G. the Spanish envoy, the plaintiff alleged the defendant was a trader. On the other side it was said, that the circumstance of the trade was so minute that it could not amount to a trading, and that the defendant could not have been a bankrupt under that circumstance; but it was replied that a probable cause will make a bankrupt; and it was further alleged that the defendant was no domestic servant, being a courier, and paid for each journey, and neither living in the house, nor receiving wages by the year, and that being registered in the sheriff's office was not material. The Court discharged the rule to stay proceedings.

9. *NOVELLO V. TOOGOOD*. E. T. 1823. K. B. MSS.; S. C. 1 B. & C. 554; S. C. 2 D. & R. 833.

Declaration in trespass, that on the 13th of September, 1821, defendant broke and entered the dwelling-house of the plaintiff, and took and distrained divers goods and chattels belonging to the plaintiff. Plea, not guilty. It appeared at the trial that the plaintiff was a British subject; that he occupied a house in the parish of St. J. and let a part of it as lodgings; that the defendant was the collector of the poor's rate at the time of the distress; that the rate was regularly made; that a sum of — was payable for the plaintiff's house for half a year; that the warrant of distress and all the proceedings were regular in point of form. It also appeared that the plaintiff had for the last 25 years been in the service of the ambassador from the crown of Portugal, who is a Roman Catholic, and has a chapel annexed to his house; that the plaintiff did not live there, but sang in the chapel as first chorister, an office necessary to be performed by the ritual of the Roman church, and that his name was affixed in the sheriff's office as a person in the service of a foreign minister. It also appeared that the plaintiff, during the period for which the rate was due, acted as prompter at the King's Theatre, which was an ab-

* The distinction between a menial and domestic servant can scarcely be considered well founded, and is inconsistent with the uniform practice, as it implies that the servant must reside in the house of his employer, which it has been shown (*ante*, p. 694.) is unnecessary, and that his duties must be confined to those of a strictly domestic description.

poor's rate
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be arrested.

solute engagement, without any provision as to the time to be employed in the chapel, and that he was during all that period a teacher of music and of foreign languages. A verdict was found for the plaintiff, subject to the opinion of the Court upon the above facts.

Per Cur. We are all of opinion that this distress was legal. If this were a question whether the chorister who had so many other employments, could be arrested, we should hesitate; but as this is an action for taking the goods, and not for arresting the person, we think that the plaintiff cannot recover. The act passed in the reign of Queen Anne is in unison with the law of nations, and merely confirmed the common law; now the privileges of an ambassador extend only to matters that concern his own personal convenience, his dignity, and the performance of his religious duties. It might be inconvenient for all the suit of an ambassador to live in the same house; but then if any of his servants take a house, it ought to be such a one as that servant can occupy himself, and not a large house to be made profitable by letting lodgings. If we were to sanction this exemption, we should enable a number of British born subjects, under the pretence of acting in some nominal office to an ambassador, exempt their goods from the payment of rates and taxes, although they followed other occupations, with which the ambassador was not in any manner concerned. Inasmuch, therefore, as the seizure of the plaintiff's goods did not in the least prevent him from singing as a chorister to the ambassador, we cannot hold that the distress was illegal. Judgment of nonsuit. See 1 Bl. Com. 254; Vattel. b. 4. c. 14. § 120; c. 7. § 104. c. 8. § 114; 1 Burr. 401; 3 id. 1478; 1 Bl. 471; 3 Burr. 1676. 1731; 4 id. 2016; 1 Wils. 20; 78; 3 id. 33; 2 Str. 797; Fitz. 200. S. C.; 3 T. R. 79; 1 Bl. 48; 3 Campb. 47; 3 M. & S. 289.

Persons
who are tra-
ders, or
objects of
the bank-
rupt laws,
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ed.

10. MARTIN v. SHAROFIN. T. T. 1731. C. P. Ch. Prac. 65. S. P. FONTAINE-
IER v. HEYL. T. T. 1765. K. B. 3 Burr. 1731. DESERISAY v. O'BRIEN-
H. T. 1735. C. P. Barnes. 375; Ca Prac C. P. 134.

On the defendant's being arrested, he moved to be discharged, on the ground that he had a certificate from the Count de Broglio, the French ambassador, of his being a master of the horse; but, upon its being shown that he was a trader, and an object of the bankrupt laws, the Court discharged the rule.

11. CAIN v. MOLINEUX. H. T. 1735. C. P. Barnes. 374.

[499] Defendant moved to be discharged out of execution, being steward of the household to Baron Bourk, a foreign envoy, and obtained a rule to show cause, which was afterwards discharged on hearing counsel on both sides; it appearing that defendant was a trader; that he resided in his own house in Old Palace Yard, Westminster; and that the envoy was at Hanover at the time of the arrest.

As where it
appeared
that he was
a trader, &
resided in
his own
house, and
the envoy,
under
whom he
claimed,
was abroad,
the Court
refused to
discharge
him.

But the
mere cir-
cumstance
of the party
having been
in trade sev-
en years a-
go does not
deprive him
of protec-
tion.

12. Vide TRIQUET v. BATH, 3 Burr. 1478; S. C. 1 Bl. Rep. 471.

On the part of the defendant, to obtain his discharge, it was sworn that he was regularly appointed by Count Haslang, to be one of his English Secretaries at 30*l.* per annum for board and lodging, &c. and he swore to actual attendance and actual service. On the part of the plaintiff it appeared, that Bath was a mercer in Dublin about seven or eight years ago; that he had afterwards been a commissary of stores abroad, and was now upon half-pay as such at 15*s.* per day; that he spoke only English; that he had never eat nor lodged in the count's house, or received any wages; that whilst he carried on trade in Ireland he bought goods in England, and sold them in Ireland. But the Court held that the circumstance of the defendant having been in trade seven years was not sufficient to divest him of his right to protection, or to bring him within the exception respecting traders in the statute of Anne.

(B) IN WHAT MANNER ADVANTAGE IS TO BE TAKEN OF THE PRIVILEGE.*

* When the privilege of protected persons has been infringed, the Court from whence the process issued should be moved to discharge them out of custody, or that the bail bond may be delivered up to be cancelled.

1. **HOLMES v. GORDON.** M. T. 1733. K. B. Ca. Temp. Hard. 3. S. P. SEACOMB v. BOWLNEY. H. T. 1743. K. B. 1 Wils. 20.

The defendant's counsel moved on the stat. of 7 Ann. c. 12. to discharge the execution against the defendant, as being a servant to Baron Hopman, resident from the Duke of Mecklinburgh. The defendant was stated to be an officiating servant to the baron, and to have continued in his service till the time of his arrest, and a certificate of his being a servant to the baron being registered in the secretary's office, and also in the sheriff's office, according to the statute, was proved. *Per Cur.* No mention is made in what capacity he served; he only swears that he was an officiating servant. A defendant in order to substantiate his claim to privilege, as a domestic to a public minister, ought to show by affidavit, in clear and distinct terms, the particular office with which he is invested. See *Widmore v. Alvares, Fitzg.* 200; *Evans v. Higgs*, 2 Stra. 797; 2 *Ld. Raym.* 1524; *Fontainier v. Heyl*, 3 Burr. 1731; *Toms v. Hammond, Barnes.* 370.

The affidavit, stating the defendant to be an ambassador's servant, should state the capacity in which he serves.

[a00]

2. **HEATHFIELD v. CHILTON.** H. T. 1767. K. B. 4 Burr. 2016.

The affidavit filed in this case, to obtain the defendant's discharge from custody, not having stated that the defendant was in the service of the minister at the time when the arrest was made, the Court observed, that even supposing the employer of the applicant to be a minister of such a kind as entitles him to privilege, yet they thought it not a case of privilege by the law of nations, for the defendant did not appear to have been in the service of the minister at the time of the arrest; and, from the mode of swearing adopted by the deponent, the Court must assume that he was not in the minister's service at the time of the arrest. Where a man has no privilege at the time of the process being executed, no subsequent exemption can be conferred on him by being afterwards taken into the service of a public minister.

And that he was possessed of the appointment at the time of the arrest;

[501]

3. **FONTAINIER v. HEYL.** T. T. 1765. K. B. 3 Burr. 1731. S. P. TRIQUET v. BATH. M. T. 1766. K. B. 3 Burr. 1478. S. C. 1 Bl. Rep. 471.

On showing cause against a rule which had been obtained why an execution should not be set aside, and restoration, &c. made to the defendant, he being under regular protection as the domestic servant of a foreign minister, it was proved by affidavits, as well as by writing, under the defendant's own hand that he was a trader, and had described himself merchant, and that the allegation of his being *valet de chambre* to the minister was a mere fiction. The Court entertained this opinion, refused to discharge the defendant, observing that it was necessary for the defendant to show the nature of the service, and swear to the actual performance of it. Rule discharged. See 1 Wils. 278; 1 Bl. 48; 1 Barnard 79. 80. 401.

And actually fulfilling the duties attached to his situation; Merely stating that he is retained as *valet de chambre*, without further description, is too loose and indefinite.

- A. **CROSSE v. TALBOT.** T. T. 1723. K. B. 8 Mod. 288.

The affidavit stated that the defendant was retained as *valet de chambre* to M. H., the Duke of Holstein's resident here, at a certain sum per week. A certificate of his holding the appointment was produced under the resident's own hand; but the Court discharged a rule which had been obtained to show cause why the bail bond given upon his arrest should not be delivered up to be cancelled.

It is not, however, necessary that every particular act of service should be specified; it is enough, if an actual

5. **TRIQUET AND OTHERS v. BATH, AND PEACH AND ANOTHER v. BATH.** M. T. 1764. K. B. 3 Burr. 1478; S. C. 1 Bl. Rep. 471.

On a rule to show cause why the bill of Middlesex should not be set aside, and the bail bond delivered up to be cancelled, the question was, "whether the defendant was really and *bona fide* a domestic servant of the Bavarian minister, or whether the appointment he had obtained was only colourable." On the part of the defendant, every thing was sworn that, in absolute strictness, could be required to bring him within the description of a domestic servant; but on the part of the plaintiffs it was proved that the defendant was a mercer in Dublin about seven or eight years before; that he had afterwards been a commissary of stores abroad, and was then upon half-pay. That he spoke only English; that he had never eat nor lodged in the minister's house, nor received any wages, nor were any due; and that whilst he carried on a trade,

bona fide engaged himself to be substantiated. The fact of the application cannot be

should be shown.

trade in Ireland he bought goods in England, and sold them in Ireland. *Per Cur.* It is not to be expected that every particular act of the service should be particularly specified; it is enough if an actual *bona fide* service be proved; and if such a service be sufficiently proved by affidavit, we must not, upon bare suspicion only, suppose it to have been merely colourable and collusive; and as to the point of his being a trader, his having been so in Ireland (and even that seven years before) will not bring him within the exception of the 5th clause of the act.

[502]

Registration is necessary to render parties liable criminally for infringing the privilege;

And if the name be not registered, the officer may execute the process.

III. OF THE PUNISHMENT FOR INFRINGING AN AMBASSADOR'S OR HIS SERVANTS' PRIVILEGE.*

1. *HOPKINS v. DE ROBECK.* H. T. 1789. K. B. 3 T. R. 79.

Per Cur. The statute 7 Anne, c. 12. requires the names of the persons claiming the privilege to be registered, for the purpose of proceeding against the parties criminally for a violation of the act. See *Heathfield v. Chilton*, 4 Burr. 2017.

2. *SEACOMB v. BOWLNEY.* T. T. 1747. K. B. 1 Wils. 20.

The defendant having been arrested by an officer of the sheriff of Middlesex, produced a certificate that he was chaplain to Baron W. resident to the Queen of Hungary; upon which the officer released him; and the plaintiff having served the sheriff with a rule to return the writ, it was moved, on behalf of the sheriff, to discharge the rule; and upon showing cause it was objected by the plaintiff that though the affidavit swore he was chaplain to the resident, yet it did not state that the defendant did actual duty. *Per Cur.* The act of parliament has not given protection to any but domestic servants of ambassadors; and it has always been part of the inquiry of the Court what was the nature of the office of every servant. As to the bailiff, he had nothing to do but to see whether the defendant's name was entered in the sheriff's office; for if his name was not there, the officer was in no danger by arresting the defendant; for the affidavit on behalf of plaintiff swears, that the officer was told that the defendant was not registered; and notwithstanding the bailiff thought fit to discharge him, the sheriff must return the writ.

3. *DELVALLE v. PLOMER.* T. T. 1811. 3 Campb. 47.

When a sheriff has refused to execute process against the servant of a minister, the plaintiff may prove that the servant's ap

The defendant, the sheriff of M., attempted in this case to justify a return of *nulla bona*, by showing that the individual, against whose goods it had been issued, had the appointment of domestic servant to the publicly recognized minister from the Prince of Hesse, and that a notice intimating that the original defendant was one of the ambassador's domestic servants was stuck up in the sheriff's office. It was submitted that the proof of these facts was a conclusive answer to the action on the part of the plaintiff. It was proposed to be shown that the appointment was colourable and fraudulent; and Lord El-

* The 4th & 5th sections of the stat. Anne, c. 12, point out and prescribe the manner in which an infraction of the privilege, either of ambassadors or their servants, is to be punished, by enacting, that in case any person or persons shall presume to set forth or prosecute any writs or process, such person and persons, and all attorneys and solicitors, prosecuting and soliciting in such case, and all officers executing any such writs or process, being thereof convicted by the confession of the party, or by the oath of one or more credible witnesses, before the Lord Chancellor, or Lord Keeper of the Great Seal of Great Britain, the Chief Justice of the Court of Common Pleas, for the time being, or any two of them, shall be deemed violators of the law of nations, and disturbers of the public repose, and shall suffer such pains and penalties, and corporal punishments, as the Lord Chancellor, Lord Keeper and the said Lord Chief Justice, or any two of them, shall judge fit to be imposed and inflicted. Provided that no person shall be proceeded against as having arrested the servant of an ambassador or public minister by virtue of this act, unless the name of such servant be first registered in the office of one of the principal secretaries of state, and by such secretary transmitted to the sheriff of London and Middlesex for the time being, or their undersheriffs or deputies, who shall upon the receipt thereof, hang up the same in some public place in their office, whereto all persons may resort, and take copies thereof without fee or reward; but an infraction of the law of nations would, independently of the statute, have been a misdemeanour punishable, at the discretion of the Court, by fine imprisonment, and pillory. The act does not appear to have introduced any new regulation beyond specifying the tribunal and medium through which the punishment shall be inflicted. As the statute does not make the offence felony, the punishment cannot of course extend to the deprivation of life. See 3 Brownl. 480; 3 M. & S. 291.

lenborough, C. J. deemed the evidence admissible, observing that if she had pointment not a legal appointment, the notice was a mere nullity. The question to be tried was, whether the party was or was not really a servant to the public minister. ^{was colour able.*}

Amendment†

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See also tit. Abatement, Affidavit, Arbitration, Attorney, Bail, Certiorari, Dower, Ejectment, Fine and Recovery, Formedon, Habeas Corpus, Manda-

* In general when the sheriff refuses to execute process against a party claiming the privilege, who is not *bona fide*, and without collusion, an ambassador's servant, the plaintiff has an election either to bring an action against him for a false return, or rule him to return the writ. By either of these means the question of the defendant's title to the privilege of exemption from arrest will be brought directly before the Court, and receive a full investigation.

† Amendments are either by common law or by statute: by the former all mistakes were amendable during the same term; 4 Inst. 255; and when the pleadings were *ore tenus*, at the bar of the Court, if any error was discovered in them, the amendment was made *instantly*. Afterwards, when the pleadings came to be in paper, a similar indulgence was allowed; hence it is now the settled practice of all the Courts, before the proceedings are entered on record, to permit amendments, in form or in substance, on proper and equitable terms. The application for permission to amend should be made to a judge at chambers for a summons, calling upon the opposite party to show cause why the party applying for the indulgence should not have leave to amend. In other cases the amendment may be obtained by application to the Court; or if the defect be in the record of *nisi prius*, by permission of the presiding judge. After judgment, and before error brought, a judge at chambers will not in general entertain the application; it should be made to the court. The rule is a rule *nisi*, which is afterwards made absolute or discharged, as in ordinary cases.

mus, Misnomer, Quo Warranto, Replevin, Right, Writ of, Sessions, Usury, Warrant of Attorney.

[504]

The court may amend at common law in all cases whilst the proceedings are in paper,† that is until judgment is signed, and during the term in which it is signed.

(A) GENERAL RULES.*

1. ANONYMOUS. E. T. 1694, K. B. 3 Salk. 31. S. P. ANON. E. T. 1692, K. B. 1 Salk. 47. TURNER v. BARNABY, T. T. 1702, K. B. 2 Salk. 556.

Ruled that whilst the plea was in paper the Court may give leave to amend at pleasure, because such a case was not within the statutes of amendments; but, when once engrossed on parchment, the Court can give leave to amend no further than is allowed by the statute, for it is then a record, and ought not to be altered or obliterated. Where the roll varies from the original, the roll may be amended at common law at any time, for the original is a record of itself, and the entry of it on the roll is only *ex abundanti*, though the usage is to enter it. So, during the term, the Court may amend any mistake in the roll at common law, for the roll is only the remembrance of the Court during the term; but after the term the Court cannot amend any fault in the roll, for then the record is not in the breast of the Court, but in the roll itself.

See 3 Bl. Com. 407; 2 Burr. 756; Say. 285; 1 Wils. 7. 76. 223.

[505]

And in this respect there is no difference between civil and penal actions. And the statutes of amendment do not extend to inferior courts.‡

2. BONFIELD, *qui tam*, v. MILNER, M. T. 1760, K. B. 2 Burr. 1098. S. P. RICHARDS, *qui tam*, v. BROWN, E. T. 1779, K. B. 1 Doug. 114.

In a *qui tam* action for usury, a rule having been obtained for amending the declaration in altering the date of the note, the proceedings still being in paper. *Per Cur.* It is a clear rule of law, that while all is in paper you may amend. Where the application to amend is at common law, there is no difference between civil and penal actions. See 5 Bur. 2833; 2 T. R. 707; 4 id. 159; 6 T. R. 171; id. 543; 7 id. 55; 8 id. 30; 6 Taunt. 19.

3. MORSE v. JAMES, M. T. 1738, C. P. 7 Mod. 245; S. C. Willes, 125.

Action of trespass, for driving away the plaintiff's cattle and impounding

* In all cases amendments are entirely in the discretion of the Court, and are allowed only in the furtherance of justice; *Rex v. Corporation of Grampound*, 7 T. R. 699; but it is no ground for refusing an amendment that an advantage is taken from one party which he before possessed, since that in the case in every amendment; *Mestaer v. Hertz*, 3 M. & S. 450; though it will never be granted when the amendment will operate prejudicially upon the right of third persons; and *Lord Ellenborough*, in *Hunt v. Pasmon*, 4 M. & S. 329, observed that he did not recollect any case in which the Courts had so done.

† Amendments might be made at the common law, both in civil and penal actions, whilst all the proceedings continued in paper; for they were then considered as only in *feri*, and therefore subject to the controul of the Courts, but after the pleadings were once entered on record, it was formerly held that by the common law no amendment could be permitted, unless within the very term in which the judicial act so recorded was done; for during that term the record is in the breast of the Court, but afterwards it admitted of no alteration; but now the Courts have become more liberal, and, where justice requires it, will allow of amendments at any time while the suit is depending, notwithstanding the record be made up and the term be past; however, where an amendment is made in any subsequent term, the proceeding must still be supposed to be in paper; for where the Court cannot help seeing that they are upon record, they have no authority to give leave to amend, except in such particulars as are comprised in one or other of the statutes of amendment; and even where the pleadings are still in paper, the Court will not permit an amendment to be made, unless application for that purpose be made within a reasonable time.

‡ After the term of which judgment is signed, and the pleadings, &c. duly recorded, the amendment cannot be made at common law, but by virtue of the statute of amendments only. Co. Litt. 260. By the earliest of these acts, 14 E. 3, st. 1, c. 6, it is enacted "that no process shall be annulled or discontinued by misprision of the clerk, in writing one syllable or letter too much or too little; but as soon as the mistake is perceived, by challenge of the party, or in other manner, it shall be amended in due form, without giving advantage to the party that challengeth the same, because of such misprision." The judges construed this statute so favourably for suitors, that they extended it to a word; and by the 9 H. 5, st. 1, c. 4, it is declared that they shall have the same power, as well after as before judgment, so long as the record and process are before them. This statute is confirmed and made perpetual by 4 H. 6, c. 3, with a proviso, that it shall not extend to process of outlawry, &c. By the 8 Hen. 6, c. 12, the justices are farther empowered to examine and amend what they shall think in their discretion to be the misprision of their clerk, on any record, process, word, plea, warrant of attorney, writ, panel, or return; and by the 8 H. 6, 15, they may amend the misprisions of their clerks and other officers as sheriffs, coroners, &c. in any record, process, or return before them, by error or otherwise in writing a letter or syllable too much or too little.

§ The language, however, used by the Court in this case, "that the words of the statutes

them, &c. The defendant justified by virtue of an execution from an inferior court of record, called the Mesne Law Court, within the forest of Dean, in the county of Wilts, and that being an officer of that court, by virtue of an execution to him directed, he levied the plaintiff's cattle, &c. to satisfy a judgment obtained against him in that court. To this plea of justification the plaintiff demurred; and the defendant joined in demurrer, assigning for cause, that the writ was repugnant in saying that the precept issued the 24th and tested the 26th, two days after; and the question was, whether this was amendable? *Per Cur.* If this discrepancy be amendable, it must be by virtue of the stat. 8 H. 6, c. 12 & 15; and to establish this proposition the counsel for the defendants have cited several cases; but the words of these statutes plainly do not extend to inferior courts, for they only direct that the king's judges and the king's justices may amend, which words have always been construed not to include judges of inferior tribunals. The cases cited of *Dolphin v. Clerk*, Cro. Jac. 64; *Comyn v. Kyne'o*, id. 162; *Aylesworth v. Chadwell*, Cro. Car. 38; *Smith v. Harward*, Sir T. Jones, 41; and several other books, are all of amendments by the courts of Westminster Hall; and there has been no case cited, nor can we find any, of such amendments made by inferior courts. [506]

4. *BIRCH v. LINGEN*, T. T. 1681, K. B. 2 Mod. 316; S. C. Skin. 46.

Judgment was obtained upon a bond 25 years old, and in one of the continuances from one term to another there was a blank. The executors of the defendant brought a writ of error, and the plaintiff, in the action, obtained a rule to amend and insert the continuance, suggesting to the Court that it was a judgment of a few terms, and aided by the statute of 16 & 17 Car. 2, c. 8. Upon this rule the plaintiff filled the blank; and the record was certified, properly perfected, into the Exchequer Chamber. On a motion that the record ought to stand as it did at first, because the rule was granted upon a suggestion, it being a judgment before the restoration of the king, and a discontinuance not amendable. Pemberton, C. J. was of opinion that this was not a discontinuance, but an insufficient continuance, and an omission of the clerk only, who, if he had filled up this blank himself without rule, it could not afterwards be set aside; but Jones, J. was of opinion, that it was such a misprision of the clerk as was not amendable by the statute of 3 Hen. 6, c. 12, since it was not the same term, and all the proceedings being in the breast of the Court only during the term, it ought not to be altered, but left in blank as it was; for where judgment is entered for the plaintiff, the Court may, upon just cause, alter it the same term for the defendant, but not of another term, the whole term being but one day in law; and though the writ of error be returned into the Exchequer, that will make no alteration, for the record itself remains still here, and it is only a transcript that is removed thither, *sed adjournatur*. Subsequently it was holden by the Court that this was not amendable by the clerk, without the order of the Court; but if done of amendments do not extend to inferior courts," must, it is presumed, be understood with this qualification, that the inferior court itself cannot amend; for if a writ of error be brought in the King's Bench from an inferior court, for an error amendable by the statute of 8 H. 6, c. 12, there seems to be no reason why the superior court should not amend that error, the words of that statute not being that "in any action brought in any of the superior courts," but "for error assigned in any records, &c. no judgment shall be reversed, &c. but the king's judges, &c. may amend, &c." Id. 126; but see 1 Rol. Ab. 209-10, *semb. contra*. [507]

There is evidently a distinction in the penning of the different statutes on this subject, some speaking of the superior courts, others extending to the inferior courts of record. The st. 8 H. 6, c. 12, and c. 15, speaks of "the king's judges," "the king's justices," and "the said courts of the king." The stat. 16 & 17 Car. 2, c. 8, is expressly confined to actions "in the court of record at Westminster, the county palatine of Chester or Durham, and the great sessions in Wales;" and by stat. 5 G. 1, c. 13, where a verdict has been given in any action in any of his majesty's courts of record, certain defects may be amended, after a writ of error brought; whereas the language used in the statute 32 H. 8, c. 30; 13 Eliz. c. 14, 21 Jac. 1, c. 13; and 4 & 5 Ann. c. 16, is in any court of record. But notwithstanding this apparent distinction in these different statutes, it is observable that Lord C. B. Gilbert (*Hist. C. P.* 112, &c.) classes them chronologically, and says that those made prior to the 21 Jac. 1, c. 13, are confined to the courts above, and that that statute, and all the subsequent ones, extend to all courts of record.

by him according to law, they could not alter it, but they could punish him. See 2 Saund. 289; 12 Mod. 8; Stra. 139; Cro. Eliz. 390; Burr. 710; 1 Bac. Ab. 89; Cro. Eliz. 320.

5. ANON, H. T. 1772, K. B. Lofft. 155. S. P. STAPLE v. HEYDON, M. T. 1702, K. B. 6 Mod. 2.

Payment of costs is incident to all amendments. All rules to amend are with payment of costs. With respect to costs in particular cases, see the sub-divisions of this title, as Declaration, Plea, &c.; and 1 Lev. 32; 2 Vent. 296; Salk. 569; Barnes, 125; 1 Burr. 301; 3 Burr. 304. G. REX v. R. PHILLIPS, H. T. 1759, K. B. 2 Burr. 757; S. C. 2 Stra. 1241.

But only such costs as are necessarily occasioned by the amendment. The defendant had leave to amend his plea on payment of costs, but the amendments made in it were not essential to the real merits, nor such as defaced the record (there being much more struck out than put in). The allowance made to the prosecutor upon the amendments of the plea itself, and of the subsequent pleadings upon it, had been only made in proportion to the actual amendments made therein, and not as for an entire new plea.

Lord Mansfield, C. J. The principle certainly is right, that where the defendant has leave to amend his plea, the prosecutor ought, in justice, to have liberty to reply *de novo*, if he judges proper; and, at all events, he ought to be allowed the expense of attending and consulting and seeing counsel, in order to advise whether it be prudent or proper to reply *de novo* or not. But where he does not judge proper to depart from his former replication, and reply *de novo*, but only makes such alterations in it as merely pursue and are the natural and necessary consequences of the alteration made in the plea by the defendant, and which alterations in the replication do not deface the record (which, he took notice was the present case,) nothing more ought to be allowed than in proportion for such necessary alterations and amendments in the replication and its several dependencies; for it must not be left in the prosecutor's power to load to the defendant unnecessarily, either out of spite or vexation, or for any other reason, exceeding the bare necessity of the thing.

Mr. Justice Denison (the only judge then in court) was of the same opinion; consequently, as the master of the crown office had acted agreeably to this reasoning, the prosecutor's counsel took nothing by their motion. See 2 B. & P. 465; 3 Mod. 112; 1 Lord Raym. 93, 116; 1 East. 372; 10 id. 237.

7. ANON, T. T. 1739, C. P. 7 Mod. 299.

If the error arise from the gross neglect of the attorney, the Court will make him pay the costs of the amendment.* The Court cannot amend a deed.

This was a motion in arrest of judgment; 1st, because the cause was tried as an action of trespass, and the writ was purchased as an action of trespass on the case. 2dly, The writ was purchased against James Stiles, and the declaration was against John. 3dly, It was not laid in the declaration that the defendant took the plaintiff's goods, though it was in the writ. 4thly, The distress was issued out to the coroner to return the jury, which is said in the *juratur* to be returned by the sheriff. The Court thought the neglect so great in the attorney, that they ordered him to pay the expense of the motion.

8. STEELE, DEMANDANT; CLENNELL, TENANT, Benn. Vouchee, E. T. 1815, C. P. 6 Taunt. 145. S. P. FORSTER, DEMANDANT, Ibid. 323. S. P. FOX, DEMANDANT, Ibid. 652.

Per Cur. We cannot amend the deed of a party. See 1 Taunt. 257.

The memorandum may be amended by the warrant of attorney on the plea roll.

(B) OF THE WARRANT TO SUE OR DEFEND.†

1. PARSON v GILL, T. T. 1702, K. B. 1 Salk. 88; S. C. not S. P. 2 Lord Raym. 695; S. C. & S. P. 2 Ld. Raym. 895; S. C. not S. P. 1 Com. Rep. 117.

The entry on the top of the plea roll was, that the plaintiff ponit loco suo,

* The ancient practice was to impose a fine upon the pleader (in whose ignorance or inadvertence the defect originated;) but by the statute of Malbridge. 52 H. 3, c. 11, it is provided, "that neither in the circuits of justice nor in counties, hundreds, and courts baron, any fines shall be taken *pro pulchre placitendo*, or *beau pleader*;" that is, for leave to amend vicious pleadings. And it should seem that this prohibition is extended to the superior courts by the statute of Westminster the first, 3 Ed. 1. c. 8, confirmed by 1 Ed. 3. st. 2. c. 8.

† By the statute 32 H. 8, c. 30, all persons deliver their warrants of attorney to be entered on record, &c. is the same term when issue is entered, &c. But the want of a war-

J. S. attorn' suum; and the memorandum was, that the plaintiff venit et pro-lit, &c. but did not say per attonatum suum, or in propria persona sua. Error being brought in the Exchequer Chamber, it was moved to amend the declaration by the top of the plea roll; and Holt, C. J. held that it might be done, for a warrant of attorney upon the plea roll is as much a record as if entered on any other roll, and it cannot be intended but that the plaintiff declared by attorney, his name being to the judgment paper. See 41 Edw. 3. 1; 19 H. 6. 15; 35 H. 6; Br. Amendment, 69.

2. PHILLIPS v. SMITH, E. T. 1717, K. B. 1 Com Rep 279; S. C. 1 Stra. 136.

After error assigned, the Court of King's Bench was moved that in the warrant of attorney the word bugi might be made burghi, for the warrant of attorney was not filed till T. T. 2 Geo. though the bill was filed E. T. 1 Geo. and the declaration 2 Geo.; and it is sufficient that the warrant of attorney be filed in the same term in which the issue was joined, and therefore the warrant of attorney here was filed in due time. Then the warrant of attorney here not being filed till Trin. 2 Geo. and the plaintiff having before appeared and declared by the said H. G. his attorney, against the defendant, T. Smith, ballivum burgi, Ivelchester, it appears that H. G. was his attorney against the same Thomas Smith, ballivum burgi, Ivelchester; and therefore, when the entry is po' lo' suo, H. G. attorn' suum versus Thomas Smith, ballivum bugi, Ivelchester, this was a misprision of the clerk, who wrote bugi for burgi, and ought to be amended by the record, in which the entry was well made. And though it was objected that the bill and the declaration were subsequent to the warrant of attorney, and therefore the entry not amendable by them, yet it was amended.

3. POWER v. JONES, T. T. 1720, K. B. 1 Stra. 445. S. P. KERRY v. CADE, [509] M. T. 1740, C. P. Barnes, 413.

Error coram vobis, and infancy, and appearance by attorney, assigned for error; motion, that the attorney might be obliged to set it right. But the Court said they could not do it, because there was no express undertaking to appear. See post, tit. Appearance; Goodright v. Wright, 1 Stra. 38; Stratton v. Burgess, 3 Vin. Ab. 281.

4. THE DUTCH EAST INDIA COMPANY v. HENRIQUES ET AL. E. T. 1727. C. P. Ca. Prac. 44; S. C. Prac. Reg. 25 S. P. COOKE v. THE DUCHESS OF HAMILTON, 1718, C. P. Ca. Prac. 10.

In scire facias on a recognizance of bail, the warrant of attorney was de placito transgressionis super casum scire facias; after error brought, and want of a warrant of attorney assigned for error, the Court gave leave to strike out the words transgressionis super casum, and insert the word debili.

5. RICHARDS, qui tam, v. BROWN, E. T. 1779, K. B. Doug. 114.

The plaintiff sued the defendant in an action for usury, and obtained a verdict and judgment in the Court of King's Bench; and the defendant having brought a writ of error in the House of Lords, assigned for cause that the attorney who had appeared on record for the plaintiff had no warrant from him, a motion was made on the behalf of the plaintiff, pending the writ of error, that the judgment roll might be amended by striking out the name of Robert Mayes in the plaintiff's warrant, and inserting that of John Stapleford, John Stapleton being the name in the memorandum of the declaration; and the Court, after cause shown, gave the plaintiff leave to make the amendment. See Dy. 180. pl. 48; 2 Ld. Raym. 1532; 2 Stra. 807.

Warrant of attorney for either party is aided after verdict by the 32 Hen. 3, c. 30, and 8 Eliz. c. 14, though not after judgment by default; but to obviate this omission the party, even after error brought, may file his warrant, and have it returned on the certiorari. See Bradburn v. Taylor, 1 Wils. 85.

* But if a plaintiff under ego appear by attorney in personal actions or ejectment, it is aided after verdict by 21 Jac. 1, c. 13, and after judgment by confession nil dicit or non sum informatus, by the 4 & 5 Ann. c. 16, s. 2. Vide post, tit. Appearance.

† In Heley v. Regis, Moore, 711, the attorney was called in the warrant John Keeling, and in the declaration William Keeling, and the amendment made was to alter William to John. The Court allowed the amendment, on the ground that by intentment the warrant of attorney is antecedent to the declaration.

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Where the plaintiff has obtained judgment by default, but omitted to file a warrant for the defendant, shall have leave to amend.

6, *FRENCH v. CORNELYS*, H. T. 1763, C. P. 1 Bl. Rep. 453. Error was assigned that no warrant of attorney for the defendant (the plaintiff in error) was entered on the record below. It was insisted for the defendants in error that a man should not take advantage of his own neglect in not making proper entries on the record; to which it was answered, that in judgments by default, the plaintiff is to make up the whole record, and therefore it is his own laches. The Court ordered the cause to stand over till the Court of Common Pleas could be moved for leave to amend the record. Afterwards, on an application to the Chief Justice of the Common Pleas, at his chambers, he directed a proper warrant of attorney to be filed and entered, and thereupon a new *certiorari* issued, and the judgment was affirmed in the King's Bench.

(C) OF THE MESNE PROCESS.

(a) *In suits by original.*1. *KING v. KING*, M. T. 1738, C. P. 7 Mod. 250.

Original writ not amendable unless in a misprision* [511]

Motion to amend an original and declaration. The action was brought by the plaintiff as administrator, whereas he and another were executors; and the question was, whether this could be amended. *Per Cur.* The motion is to amend the declaration and original, but, in fact, it is but an amendment in the latter; for if we grant the amendment in the original, the declaration may be amended of course; so that the question will be, whether he can amend the original. And as to that, there are two rules by which we are to be governed; the one is, that no amendments in the original writs can be made, unless it be the misprision of the clerk; the other, that nothing can be amended unless there is something to do it by. In the present case, it is not so much as pretended that there is any misprision in the clerk or officer, nor is there any proceeding in the court to amend by. The granting of administration is the act of another court with which we have nothing to do. The statute has laid down those rules whereby we are to be governed, the present case not coming within either of them.

2. *KING v. THE BISHOP OF CARLISLE, THE UNIVERSITY OF CAMBRIDGE, LAMB AND GIBSON*, M. T. 1738, C. P. Barnes, 9.

And even then there must be some thing to amend by.

On application for leave to amend the original writ and declaration, by making the plaintiff a co-administrator instead of executor, *Per Cur.* The doctrine of amendment of original writs which is not by common law, but by the stat. H. 6. are, 1st. That no amendment of an original writ can be made unless for nescience or misprision of the clerk. 2dly. There must be something to amend by. In this case both these requisites are wanting. Here the writ is agreeable to the instruction, and therefore there is nothing to amend by. Rule discharged. See 1 T. R. 782, 783.

3. *CARTY v. ASHLEY*, T. T. 1773, 3 Wils. 454; S. C. 2 Black. 918. S. P. *BOURCHIER v. WHITTLE*, M. T. 1789, C. P. 1 H. Bl. 291. S. P. *DAVIS, ONE, &c. ASSIGNEE OF THE SHERIFF v. OWEN*, M. T. 1798, C. P. 1 B. & P. 342.

The Court may amend process by original if there be less than fifteen days between

The *capias* was tested the 11th of June, returnable on the octave of the Holy Trinity, which was the 13th of June. On motion to set aside the proceedings with costs for irregularity, because there were not fifteen days between the teste and return, a rule was granted to show cause why the plaintiff should not amend; on payment of costs. On showing cause, it was * Every defect in form in an original, the want of pledges, or of the sheriff's name being returned on it, or the want of pledges on a bill, are aided after a verdict by statute 16 & 17 Car. 2, c. 8. and after judgment by confession or fault by stat. 4 & 5 Ann. c. 16 s. 2, and all variance between them and the declaration is aided after verdict by stat. 21 Jac. 1. c. 13. and after judgment by confession or default by 4 & 5 Ann. c. 16, s. 2. Also after verdict every defect in form or substance in an original writ or bill, and all variance between them and the declaration, or other proceedings, are aided by 5 Geo. 1. c. 13; see 1 Saund. 315. And lastly, the warrant of an original, or bill, is aided after verdict by 18 Eliz. c. 14. but not after judgment by confession or default, nor after judgment on demurrer, or *nul tiel record*.

† It is amendable for a misprision of the clerk at any time by 14 Ed. 3; H. 1. c. 6; 9 H. 5. st. 1. c. 4; 8 H. 6. c. 12, and 9 H. 6. c. 15; provided there be something to amend by; *Green v. Bonnet*, 1 T. R. 782, 783.

insisted that there was nothing to amend by. *Per Cur.* Although this Court the teste & returns;* cannot amend an original writ, because it issues out of the court of Chancery, yet we have power to amend all mesne process, and also an attachment of privilege, which is in the nature of an original. No error can be assigned in mesne process; this is a mere mistake of the officer the filacer, and ought to be amended; for when a plaintiff bespeaks a writ returnable at such day, he impliedly orders the officer to make the teste regular; and by these implied instructions the Court may make the rule for the amendment absolute. See 1 Chit. Rep. 325; 1 Tidd. 147.

4. CARR V. SHAW AND PRICE. T. T. 1797. K. B. 7 T. R. 299.

The proceedings had been commenced by original; Shaw put in bail, and the plaintiff proceeded to outlaw the other defendant by the name of James instead of John. On discovering his mistake, a motion was made for the amendment; and *Per Cur.* The proceedings in outlawry must be set aside, but the plaintiff may amend, on paying all the costs in the former action, as well as those attending this application; and Lord Kenyon observed that the original might be amended on an application to the Master of the Rolls, though it could not be amended in the King's Bench, and that an original had been supplied even in the case of a penal action.

5. BABRUN V. TENANT, E. T. 1796, C. P. 1 B. & P. 481; S. P. STEVENSON V. DANVERS, H. T. 1803, C. P. 2 B. & P. 109.

The plaintiff was co-obligee with B. in a bond given by the defendant. An action was commenced upon the instrument, a *capias ad respondendum* issued, and recognizance of bail taken, at the suit of the present plaintiff alone. An original was afterwards sued out in the joint names of Tabrun and B.; and the Court were applied to, to permit the former errors to be amended by an insertion of B.'s name as a co-plaintiff. *Per Cur.* The rule must be refused as far as relates to the error in the recognizance, for the bail cannot be charged but by their own consent. The *capias* may be, however, rectified, as the defendant will be in as good a situation as he is in at present; for if the rule were not made absolute a declaration might nevertheless be delivered by the bye at the suit of Tabrun and B. Rule absolute as to the *capias*; rule discharged as to the recognizance. See 2 Stra. 1162; 3 Lev. 285; 2 Bl. 836.

6. STEVENSON V. DANVERS, H. T. 1803, C. P. 2 B. & P. 109; S. P. INMAN HUISE, H. T. 1806, C. P. 2 N. R. 185.

The defendant was in this case arrested on a writ sued out against him by the name of G. A.; and A. F. arrested by the name of G. A. became bound in a bond conditioned for the appearance of A. G. arrested by the name of G. A. The affidavit to hold to bail was made in the defendant's real name. A rule nisi was obtained by the defendant to enter a common appearance; at the same time a rule to show cause was obtained by the plaintiff to amend the writ. *Per Cur.* The writ may be amended by the affidavit to hold to bail. We will discharge the rule for entering a common appearance, and make the rule absolute as to the amendment, without prejudice to any application which the bail may make on their own behalf.

A rule was afterwards obtained on the part of the bail to show cause why the bail bond should not be cancelled; and a rule nisi was at the same time obtained to show cause why the sheriff should not amend his return, in order to make it conformable with the amended writ. *Per Cur.* The variance complained of between the writ and the bail bond originates from the fact of an amendment having taken place in the former. The bail bond corresponded with the process as originally issued. The requisitions of the statute 23 H. 6, c. 9, having been therefore complied with, the rule for cancelling the bail bond must be discharged, but without prejudice to the sheriff, and the rule for amending the

* In the case of Atkinson v. Taylor, 2 Wils. 117, a *capias ad respondendum* was set aside but without costs, because there was not fifteen days between the teste and return; and the case of Williams v. Faulkner, Barnes 409, wherein it was said to be error, and not a mere irregularity was overruled.

* Or in the return, Walker, v. Hawley, 1 Marsh, 399; S. C. 5 Taunt. 953; S. P. Anon, 1 Smith, 425.

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Or in the names of the parties.*

Where a *capias* is by mistake issued in the name of one plaintiff only, and an original is after wards taken out in the names of both, the former may be amended.

Where the defendant is properly designated in the affidavit to hold bail, but misnamed in the process, and the bail bond is given in his right name, adding "sued by the other," the process and the sheriff's return will be amended; but without prejudice to the sheriff, and the rule ties in the bail bond will contin

we responsi return must be made absolute. See Barnes, 10; 2 Bl. 836; 2 Show. 51; 3 T. ble. R. 572; 5 E. R. 577; 7 id. 249; 1 H. Bl. 291; 1 Chit. Rep. 282; 2 Taunt. [513] 401; 6 Taunt. 530.

Or by inser 7. RUTHERFORD v. MEIN AND OTHERS. E. T. 1805. K. B. 2 Smith, 392.
ting the christian A rule nisi had been obtained to amend the special *capias* by inserting the name of the christian names of the defendants. It was objected that there was nothing defendant, *dehors* to amend by. *Per Cur.* In Carr v. Shaw, 7 T. C. 299, a similar tho' there amendment was allowed, where there was nothing to amend by, there the name be nothing inserted was radically wrong; but here there is only a blank left for the christian to amend name.—Rule absolute, on payment of costs.
by, on pay 8. WALKER v. HAWKEY. M. T. 1814. C. P. 1 Marsh, 399; S. C. 5 Taunt.
ment of 853: S. P. ANONYMOUS, 1 Smith, 425.
costs.*

Or in the return.

On showing cause against a rule to set aside the proceedings in this cause for irregularity, the *capias* being returnable on a day certain instead of a general return day, it was argued that, in Perrot v. Hele, 3 Wils. 58, this court agreed that no advantage could be taken of an irregularity in process without having it returned, so that it might be before the Court. But at all events, on the authority of Bouchier v. Whittle, 1 H. Bl. 29, and Davis v. Owen, 1 B. & P. 242, it was contended that the service only should be set aside, and that the writ might be amended. On the other side it was submitted that the practice was always to make these motions before the writ was returned. As to amending it there was no rule before the Court for irregularity, and the writ was a mere nullity, unless it were made returnable on a day on which, by the practice of the Court, writs might be returned. Inman v. Huish, 2 N. R. 133, was cited as an express authority to show that the writ was irregular, and that the Court would not amend it.

The Court, however, on the authority of Ruebel v. Preston, where the return of the writ being wrong, the plaintiff had leave to amend it, allow the amendment, on payment of costs.

9. INMAN v. HUISE, H. T. 1806. C. P. 2 N. T. 133.

A *testatum capias* had been issued, returnable on a certain day instead of a general return day. A motion was made to set aside the proceedings; and on the Court intimating their determination of making the rule absolute, an application was made for leave to amend the return, as there was the original writ to amend by; but as it was objected that the bail would be affected by the proposed amendment, the Court refused to allow it. See 1 Chit. Rep. 323; id. 374.

But not to the prejudice of the bail.

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(b) *In suits by bill.*

1. RUSH v. TORY, M. T. 1693. K. B. 4 Mod. 867.

If a bill be filed before the cause of action accrues, it cannot be amended.
In a judgment on a *mutualis* the bill appeared to be filed on a certain day, viz. memorandum, that on Friday, &c. which day happened before the debt became due. This was assigned for error on a writ of error, brought to reverse the judgment; and the Court was moved in behalf of the plaintiff to amend the memorandum, so that it might agree with the judgment, but the Court refused the amendment. See 2 Saund. 210, a; 2 Chit. Rep. 11.

1. Cox, *qui tum*, v. MUNDAY, E. T. 1764. 1 Black. 462.

A bill of Middlesex in debt in stead of trespass, with an *ac etiam* in debt, is amendable.
On a motion to stay proceedings on a bill of Middlesex, which was in debt only, and not in trespass, with an *ac etiam* in debt. Lord Mansfield, C. J. refused a rule to show cause, unless they would produce a precedent; but on it being moved again, the Court gave leave to amend the bill by inserting the plea of trespass.

3. LAPIERE v. SIR JOHN GERMAIN AND THE DUTCHESS OF NORFOLK, E. T. 1702. K. B. 2 L. Raym. 859; S. C. 1 Salk. 50; Holt, 493; S. C. 3 Salk. 235.

In an action on the case, Sir John being sued only by the title of baronet, pleaded in abatement that he was knight and baronet; the plaintiff replied
* It was formerly held that the initials of the defendant's christian name being only inserted in the special *capias*, and affidavit to hold to bail, was sufficient; 2 B. & P. 466; but in the case of Howell v. Coleman, 4 B. & A. 536, this doctrine was overruled. See 1 Chit. Rep. 397, 398.

In a suit by bill, no amendment can be made in the bill as to

that he was baronet only, and issue joined thereon. On motion to amend on the name of the defendant after he has pleaded a misnomer, unless the amendment is warranted by the process upon which he was brought into court.

4. CLARKE v. COTTON, M. T. 1732. C. P. Barnes, 3.

A bill was filed in this cause against the defendant as an attorney of the court, and the bill, by mistake of the plaintiff's attorney, concluded *et inde producit sectam*, &c. instead of, *et inde petit remedium*, &c. Upon motion in the Treasury, the judges ordered the bill to be amended, by striking out the words *producit sectam*, and inserting instead thereof, the words *petit remedium*, upon payment of costs.

5. RUSSEL v. THORPE, E. T. 1723, K. B. 2 Stra. 583.

In debt upon a bail bond, the memorandum was of Trinity Term, and the plaintiff moved to amend, but it was objected to, as there was nothing to amend by; *Per Cur.* We cannot amend it as it now stands, but we will give leave to file a new bill of Michaelmas Term, with a special memorandum, which the plaintiff afterwards did, and then amended, as of course, on payment of costs.

6. GREENWOOD v. RICHARDSON, ONE, &c. M. T. 1745. C. B. Barnes, 16: S.

P. LAW v. SALISBURY, M. T. 1754. C. P. Barnes, 24.

The bill was by mistake entitled Trin. 19 G. 2, instead of 19 & 20. Defendant moved to stay proceedings, and obtained a rule to show cause, which rule was discharged, and the title of the bill ordered to be amended, on payment of costs.

7. PALMER v. COSINS, ONE, T. T. 1759. C. P. Barnes, 26.

A rule was made absolute for leave to amend the bill filed against the defendant, as an attorney, by adding to the plaintiff's damages the sum of 150*l.* on payment of costs. The mistake was through nescience of the clerk. The Court said they were not bound to adhere to the old cases; common sense must govern their conduct.

8. SUTHERLAND v. TUBBS, M. T. 1814. K. B. 1 Chit. Rep. 320, n.

A motion was made to show cause why the copy of a writ, the service of which had been set aside for irregularity, should not be amended. *Per Cur.* This is a novel application; the rule must be refused.—Rule refused.

9. ADAMSON v. —, H. T. 1815. K. B. 1 Chit. Rep. 369, n.

A motion was made for a rule to show cause why the writ issued in the action should not be amended by inserting the name of another person as plaintiff. *Per Cur.* We cannot grant this application. A new action may, in effect, be introduced by this expedient of amending. Rule refused. See Tidd, 6th ed. 162.

10. BADAETT v. LEE, E. T. 1816. K. B. 2 Chit. Rep. 355.

A motion was made to set aside the proceedings in this case for irregularity, the defendant's name in the writ being John, and in the notice to appear Joseph. It did not appear which of the two was the defendant's real name.

Per Cur. We ought to be apprised of that. It can be amended, and when amended, the rule would be discharged. Rule refused.

11. ISRAEL v. MIDDLETON, E. T. 1819, K. B. 1 Chit. Rep. 319.

A rule had been obtained calling on the plaintiff to show cause why the service of the writ should not be set aside for irregularity, with costs; the defendant's name in the copy of the process served on him being John, instead of Nicholas. It was, however, urged that upon the defendants being served with such copy, he informed the plaintiff of the mistake; upon which the clerk offered to alter the name, when the defendant said, "Never mind, I am the person, and I will take care of it." *Per Cur.* The defendant's waiver could not cure the defect in the writ. The alteration in the copy would have been of no avail. The writ could not have been altered without being resealed, and a copy reserved. The plaintiff's attorney was therefore going to do an act

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A bill against an attorney was amended by substituting the words *petit remedium* for *producit sectam*. If there is nothing to amend by, the Court will give leave to file a new bill. But a bill improperly entitled against an attorney is amendable.

Or by adding to the damages.

The copy of a writ cannot be amended so as to make the service good, as by inserting the name of another person as plaintiff. Where the defendant's name was described in the writ as John, but in the notice to appear as Joseph, the error was held amendable; But it must be resealed in all cases.

[516] which of itself would have been an irregularity. The rule must be absolute, but without costs. See note a, 1 Chit. Rep. 320.

After plea
the abate-
ment of mis-
nomer in
the defend-
ant's name
in a penal
action, the
plaintiff
may amend
his bill and
declaration
conforma-
bly to the
plea.

An amend-
ment will be
allowed in
record by
inserting a
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tiff's bill
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costs; the
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[517]

An attach-
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12. *MESTAER AND ANOTHER, qui tam, &c. v. HERTZ*, H. T. 1815, 3 M. & S. 450. The defendant had been served with a copy of an *ultius latitai*, in the name of Moses Isaac Hertz, in an action upon the statute of usury. A declaration was filed conditionally against him by that name. The defendant entered an appearance, and pleaded a misnomer, that his name was Maurice Jacob Hertz. A summons was thereupon obtained by the plaintiff for leave to amend the bill and declaration, by substituting the true name. An order was afterwards made to amend the bill and declaration as prayed, upon payment of costs, and the amendment was accordingly made. A rule nisi had been obtained in last term for setting aside the proceedings for irregularity, or for discharging the judges' order. *Per Cur.* A refusal to amend will totally preclude the plaintiffs from bringing their action. It is, therefore, of the utmost importance that we should afford a facility to the plaintiffs to try the merits of the case, by correcting a mistake as to a fact not within their knowledge, but peculiarly within that of the defendant. And although this is a penal action it is a settled rule that where no time has been lost, so as to keep a penal action unnecessarily hanging over the head of the defendant, the Court will give leave to amend in such as in other civil actions. Rule discharged. See T. R. 611, 669; 7 id. 55, 698; 3 East, 167; 4 id. 435; 10 id. 328; 11 id. 225; 15 id. 159; 1 B. & P. 115; Salk. 52; Stra. 11, 739.

12. *MIECHIN AND OTHERS v. COPE, GENT. ONE, &c.* H. T. 1819, K. B. 1 Chit. Rep. 45.

The defendant had suffered judgment to go by default; and after judgment signed had brought a writ of error in respects of a defect in the title of the bill. A rule had been since obtained to show cause why it should be amended, by specially entitling it of the day on which it was filed, instead of being entitled generally of the term. *Per Cur.* The rule may be made absolute on the defendant's paying the costs of the writ of error; but as the defendant has taken advantage of a mistake of the plaintiff, unconnected with the merits, after he had previously suffered judgment by default, the plaintiffs ought to have the costs of the judgment. The defendants must also plead immediately, accept short notice of trial, and give the plaintiffs judgment of the present term. Rule absolute on these terms. See 7 T. R. 474.

14. *ADAMS v. LUCK*, T. T. 1821, 6 Moore, 113; 3 B. & B. 25. S. C.

A rule nisi had been obtained to set aside an attachment of privilege for being returnable after the *essoign* day, and before the *quarto die post*, instead of being returnable on a day certain in full term. *Per Cur.* The rule must be discharged; but the plaintiff may amend the writ on payment of costs, and the costs of this application. See Str. 399; 3 Wils. 58; 1 Marsh, 399; S. C. 5 Taunt. 853; 4 B. & A. 288.

payment of costs, and the costs of an application by defendant to set it aside.

(D) OF THE APPEARANCE.

1. *POWER v. JONES*, T. T. 1720, K. B. 1 Stra. 114.

If an infant
defendant
appear by
attorney it is
not amenda-
ble after er-
ror brought.
But the
Court,
where an
attorney
has under-
taken to ap-
pear for an
infant, will
oblige him to
do it in a
proper man-
ner.

The defendant brought a writ of error, and assigned infancy and appearance by attorney; on a motion that the attorney might be obliged to set it right, the Court said they could not do it in this case, because here was no express undertaking to appear, as there was in the other cases; if there had, the Court would oblige the attorney to do it in a proper manner. See *Goodright v. Wright*, 1 Stra. 24; *Stratton v. Burgess*, 1 Stra. 114.

2. *STRATTON v. BURGIS*, M. T. 1731, K. B. 1 Stra. 114.

An attorney had taken to appear for the defendant, an infant. *Per Cur.* He is obliged to do it in a proper manner; and having entered it by attorney, when it should have been by guardian, it may be amended.

3. *WHESTON v. PACKMAN*, H. T. 1770, C. P. 3 Wils. 49.

The defendant was rightly named John both in the writ and in the declara-

tion delivered; but not entering his appearance in due time, the plaintiff's attorney entered an appearance for him, according to the statute, by the name of James instead of John. A motion was made that the declaration might be set aside, because the defendant was not in Court. *Per Cur.* It is a mere slip; and the affidavit being correct, the proper officer must alter the entry of the appearance, and insert the name of John instead of James. See 1 Stra. 33. 114. 445; 3 T. R. 611; 7 id. 206; 1 B. & P. 105; 2 N. R. 122; 10 Vest. 328; 11 id. 125; 3 M. & S. 450.

4. WALLAND V. PITTS, M. T. 1732, C. P. Barnes, 4. S. P. FAGGET V. VAN THIENNEN, M. T. 1732, C. P. Ca. Prac. 75.

The bail-piece was ordered to be amended by making the recital of the writ of attachment of privilege agreeable to the writ itself, by inserting the return day of the writ, which had been omitted in the bail piece.

5. FLAGEL V. VAN THIENEN, M. T. 1732, C. P. Prac. Reg. 15.

On an application for leave to amend a recognizance of bail, it appeared that the defendant had been sued for an assault, and that a judge's order for bail had been granted; but in taking the recognizance the filacer had taken it in *assumpsit*; application was made for leave to alter it to trespass and assault. The Court ordered the recognizance to be amended.

6. ANDERSON V. NOAH, E. T. 1797, C. P. 1 B. & P. 31.

When the bail in this case came up to justify, it was objected that there was no bail in the action before the Court, as the defendant had been arrested by the name of Noah, and bail had been put in by the name of Noel. *Per Cur.* Let the bail-piece be amended. See Petersdorff on bail, 288.

7. CROFT V. COGGS, M. T. 1819, C. P. 4 Moore, 65.

The defendant was arrested in the name of Elizabeth; but put in and justified bail in the name of Betsy. A rule nisi had been obtained to amend the bail-piece by inserting the name of Elizabeth instead of Betsy. *Per Cur.* The amendment, and a re-acknowledgment by the bail. See 1 B. and P. 31; 4 Taunt. 714; 1 Barnard, 213; 3 Price, 36; MSS. East, 1814, cited Archbold's Practice, 81.

8. CHRISTIE V. WALKER AND FOUR OTHERS, E. T. 1823, C. P. 1 Bing. 206.

The affidavit to hold to bail in this case named all the five defendants. Bailable process was issued against Walker alone, and a serviceable *capias* was afterwards issued against the other four defendants, in which Walker was not noticed. The bail-piece named Walker only. The declaration was against all five. The Court had formerly refused to enter an *exoneretur* on the bail-piece on the ground of a variance between the process and the declaration. A rule nisi was now obtained to amend the bail recognizance by an insertion of the names of the other four defendants. *Per Cur.* The only object of process being to bring defendants into court; and the affidavit to hold to bail sufficiently disclosing the plaintiff's intention to sue all the five defendants, the variance in the former must not prejudice. Let the rule be made absolute, and the amendment required granted to the plaintiff. Rule absolute.

A bailpiece was taken in which the defendant who had been arrested was alone named. After declaring against all five, an amendment of the recognizance was allowed by an insertion of the names of the other four.

9. MANN V. CALOW, E. T. 1808, K. B. 1 Taunt. 321.

The declaration upon a *scire facias* against bail, alleged the obligation of the recognizance to be "that the bail should satisfy the debt and damages," supposing that it had been in the usual form; upon plea of *nul tiel record*, the recognizance appeared to be "for payment of the damages." A rule nisi was now obtained to amend the entry of the recognizance, by an insertion of the words "the debt and," before the word "damages." *Per Cur.* The entry in the filacer's book is this, "A. B. and C. D. were added as bail on a *scire* in this cause, and justified in open court in 354*l.* each, and were allowed." *facias* if it When proceedings came to be instituted against the present defendants, the officer, by reference to the writ, and from this memorandum, made out the clerk.

* *Vide post*, ut. Bail.

[519] formal part of the recognizance. It is a mere misprision of the clerk, which cannot be allowed to deprive the plaintiff of his remedy. Rule absolute, with liberty to the defendants to plead *de novo*. See 8 H. 6. c. 15; 2 B. and P. 375; 3 id. 321; 2 N. R. 103; 1 Str. 401; 2 id. 1165; 1 H. Bl. 49; 3 T. R. 659.

Or other clerical error with the consent of the bail. The bail-piece is a mendable by the instructions for the writ.

But if bail call the plaintiff by a wrong name in the recognizance through mistake, the recognizance will not be amended upon such writ record pleaded to an action brought by the plaintiff against the bail.

So a misnomer in the bail-piece will not be amended unless by consent of the bail. But where the officer misnamed the plaintiffs in his entry of the recognizance, the error was amended at the instance of the bail.

[520] And where a bailable and not a testatum capias had been issued into a county palatine, the defendant had put in bail as up

10. HALLIDAY V. FITZPATRICK, E. T. 1813, C. P. 4 Taunt. 875.

The officer, on entering the recognizance of bail, had misnamed the plaintiff in the suit. A motion was made on behalf of the bail to amend the recognizance by inserting the right name. The application was opposed; but the Court made the rule absolute, observing that the record was not the contract of the bail, but only the record of the contract.

11. MAGRATH V. CONNING, E. T. 1737, C. P. Prac. Reg. 15.

It was moved that the bail-piece might be amended by the instructions for the writ. Rule to show cause made absolute.

12. VENN V. WARNER, M. T. 1810, C. P. 3 Taunt. 263.

A rule nisi had been obtained to amend the recognizance and the subsequent proceedings by substituting the plaintiff's name of "Daniel" for "Christian." It appeared that the plaintiff in the commencement of this action was called by his true name; but both in giving bail to the sheriff, and in putting in bail above, the defendant had called him "Christian." The plaintiff sued in the name of Daniel in an action against the bail. Plea *nul tiel record*. *Per Cur.* The bail say that they acknowledge themselves to be indebted to Christian, not to Daniel. An affidavit has been made repelling any charge that the bail had designedly made the misnomer with a view of eluding the responsibility incident to his character as bail. Judgment must be therefore given for the defendants. See 13 East, 273; 1 B. & B. 48; 2 Moore, 305; 1 Bing. 206.

13. BINGHAM AND OTHERS, ASSIGNEES OF TABART, V. DICKIE, M. T. 1814, C. P. 5 Taunt. 814.

A rule nisi had been obtained to amend the bail-piece by changing "Tabart" to "Tabart." This application was made by the plaintiffs in an action on the bail bond. The bail refused to consent to the amendment; but having pleaded *conperuit ad diem*, instead of *non est factum*, judgment passed against them.

14. HALLIDAY AND ANO. V. FITZPATRICK, E. T. 1813, C. P. 4 Taunt. 875.

Bail were put in and appeared to justify at the suit of J. H.; but the officer by a misprision incorrectly named the plaintiff C. H. in the entry of the recognizance. The defendant surrendered. A rule nisi had been obtained to amend the *committur* and the bail-piece, by changing the name of C. H. to J. H. and to stay proceedings against the bail. *Per Cur.* The record is not the contract. It is only the record of the contract. It may be therefore amended. Besides, it does not prejudice the liability of the bail; on the contrary they could aver nothing against the record after the amendment.—Rule absolute.

15. HARTLEY V. HODSON, M. T. 1817, C. P. 1 Moore, 514.

A bailable, and not a *testatum capias*, had in this case issued into the county palatine of Durham. The defendant put in bail as upon a *testatum writ*. The declaration was delivered in the original action in which the venue was laid in Lincolnshire. A declaration on the recognizance was afterwards delivered, to which the defendant pleaded. A rule nisi had been obtained that the entry of the recognizance should be made conformable to the facts, and that in the mean time all further proceedings should be staid. The objections urged were, that the recognizance of bail was wrongly entitled in London; the venue in the original action being laid in Lincolnshire, and the final judgment being also obtained in that county; that an original *capias* could not, as in this case, issue into Durham; that no recognizance of bail had been made when the defendant pleaded, nor until the judgment signed in this action had been set aside, and that no *capias ad satisfaciendum* had been duly and properly returned. *Per Cur.* It is unnecessary to deter-

mine whether these irregularities could have been taken advantage of, in the first instance, if the defendant had moved to have been discharged, or to have had the process set aside. The present application cannot be supported after the defendant has submitted to the arrest, and got the bail allowed as upon a *testatum capias*. These informalities have been entirely waved by the subsequent conduct of the defendant. Considering, therefore, that the bail are bound to look to their principal on the ground of the length of time that has elapsed since the defendant's liability accrued; and taking into consideration the whole facts of the present question, we must discharge the rule, leaving the party to his ordinary remedy, whatever it may be. Such writs ought not, however, to issue into county palatines in future.—*Rule discharged*. See 5 *Burr.* 2586; 1 *Str.* 1089; 6 *T. R.* 71; 5 *East.* 462; *Rule of Court*, 22 *Geo. 3. Hilary Term*.

on a *testatum*. A declaration had been delivered and the venue laid in Lincolnshire. A recognizance of bail had been entered into in Middlesex, and a declaration thereon delivered. On a motion to amend the entry of the recognizance it was held that the defendant had waved any irregularity, and the Court refused to interfere. [521]

(E) OF THE DECLARATION.

1st. WITH REFERENCE TO THE NATURE OF THE AMENDMENT.

(a) In the title.

1. *EARLE V. ANDREWS*. E. T. 1687. K. B. Comb. 86. S. P. BAUMONT V. COSIN. T. T. 1745. C. P. Barnes. 17.

Per Cur. If a declaration be delivered in Hilary Term as of Michaelmas, and no plea put in, he may amend his declaration, or give a new declaration of Eastern Term. See 7 *T. R.* 474; 2 *Stra.* 1271; 1 *Wills.* 88; 2 *id.* 256; 1 *Chit. Pl.* 264. *Sd. ed.*; 1 *Tidd.* 434. 6th ed.; 1 *Arch. Prac.* K. B.

2. *WYATT, qui tam, v. EYLAND*. T. T. 1701. K. B. 2 Ld. Raym. 977. S. P. ANONYMOUS, M. T. 1749. C. P. 1 *Wils.* 256.

In an action for usury, the memorandum was general of the first day of the term; but bail was not put in till the middle of the term; and the court gave leave to the plaintiff to insert a special memorandum, for the defendant is not in court till bail is filed; and this is only to make the entry according to the truth which appears on record; and the Court said it was an amendment at the common law, and not on the statutes. See *Stra.* 583.

3. *WOODROFFE, qui tam, v. WILLIAMS*. H. T. 1815. 6 Taunt. 19. 1 Marsh. 419. S. C.

A rule nisi had been obtained to amend the title of the declaration in an action on the statute of usury, so as to bring the declaration within twelve months after the commission of the offence. *Per Cur.* We cannot permit the amendment. No sufficient ground has been shown to induce us to concede to the application. The plaintiff alleges as a reason for doing it, that it would let him into a case from which he will be excluded if the declaration remains as it now stands. The plaintiff, however, must connect the writ with the declaration if he can; the Court will not assist him.—*Rule discharged*.

4. *COUTANCHE v. LE RUEZ*. H. T. 1800. K. B. 1 East. 133; S. P. SYMOND V. PARMENTER. T. T. 1744. K. B. 1 *Wills.* 78.

The writ in this case had been originally issued against the present defendant and another, the latter of whom had been outlawed, the outlawry was completed on the fourth return of Easter term. The declaration against the defendant contained the usual averment that the other parties were outlawed, but was entitled generally for the same term. The defendant pleaded *inter alia*, *nul tiel record* of outlawry, on which issue was joined. A day was given to the plaintiff to bring in the record, when, in order to avoid being concluded by the production of the judgment of outlawry, which appeared to be a day subsequent to the term to which the declaration being entitled generally referred, the plaintiff obtained a rule nisi to amend his declaration, by entitling it on a particular day, being the day on which it was in fact delivered, and which was after the completion of the outlawry, instead of Easter term generally. *Per Cur.* As the day on which the declaration was delivered now appears to be material, which did not probably appear when it was first drawn and entitled, the rule must be made absolute.—*Rule absolute*. See 1 *Wills.* 78; 3 *T. R.* 624; 7 *id.* 474. 703. 5.

The title of the declaration is amendable. Even in an action on a penal statute. But in a penal action it will not be amended so as to enable plaintiff to bring his action in the time limited by statute for its prosecution. The title of a declaration will be amended in order to accord with an averment therein that other defendants named in the writ were then outlawed. [522]

And the Court will compel the plaintiff to entitle his declaration specially when the general title would deprive the defendant of his defence.

The venue may be amended by substituting one county for another. Even after the defendant has changed it on the common affidavit;

Or in penal actions;

[523]
An amendment in the venue will not be allowed in an action on the bribery act after the time of limitation, unless it is shown that the cause meant to be proved in the new county was in every respect the same as that originally intended, in the new county. Or if it is admitted that a new cause of action is meant to be insisted on unless it be sworn that the plaintiff by mistake supposed

5. SMITH v. KEY. M. T. 1725. K. B. 1 Stra. 638. S. P. THOMPSON v. MARSHALL. T. T. 1741. K. B. 1 Wills. 304. WILKES v. THE EARL OF HALIFAX, M. T. 1764. C. P. 2 Wils. 256. SOUTHOUSE v. ALLEN. T. T. 1735. K. B. Ca. Temp. Hard. 141,

In an action on a *quantum meruit* the defendant pleaded a tender on the 4th of May *ante diem exhibitionii billae*; the plaintiff replied, *non obtulit ante diem*, &c.; and, to oust the defendant of the benefit of the plea, made up the book with a general memorandum that would refer to the first day of term, which was before the 4th May. A motion was made, on an affidavit, that the tender was upon the 4th, and no writ taken out till the 6th of May, that the plaintiff might be obliged to make his memorandum special, according to the truth of the fact; and after a rule to show cause, the same was ordered.

Vide post, title Declaration, 4 Esp. 73-4; 1 Chit. Pl. 264. 3d ed.

(b) In the venue.

1. STROUD v. TILLY. H. T. 1752. K. B. 2 Stra. 1162.

Per Cur. Though a plaintiff cannot regularly move to change the venue, yet he may in effect do it by moving to amend; and it was allowed in this case by striking out Dorsetshire, and inserting Middlesex. *Vide post tit. Venue.*

2. RIVET ET AL v. CHOLMONDELEY ET AL. H. T. 1743. K. B. 2 Stra. 1202.

On the authority of the preceding case, the Court suffered the plaintiff to amend the venue, after the defendant had previously changed it on the common affidavit.

3. GRIFFITH v. HOLLIER. 1756. K. B. Sayer. 294; S. C. Kenyon. 368.

In an action on a penal statute called the Road Act, for a penalty, an application was made for leave to change the venue by substituting the county of Warwick for Gloucester. *Per Cur.* At common law, there is no difference between popular and other actions, the proceedings being on paper; consequently, the rule for the amendment must be absolute.

4. PETRE v. CROFT. H. T. 1804. K. B. 4 East. 433.

A rule was obtained calling upon the defendant to show cause why in this action (an action on the bribery act, 2 Geo. 2. c. 24. § 7. for soliciting a reward for giving a vote for a member of parliament) the declaration, issue, issue roll, and *nisi prius* record, should not be amended by changing the venue to the county where the solicitation of the bribe actually took place. The venue had been laid at Heydon in the county of York, whereas the solicitation of the bribe actually was at Kingston upon Hull, which is a county of itself. The cause had been entered for trial at the preceding assizes at York, but was afterwards made a *remanet*. It was objected that the time limited for commencing a new action for the same cause had expired, and that therefore the plaintiff adopted this mode of changing the venue, as he had a better cause of action in the county of the town of Kingston, whereby he might obviate the objection of lapse of time. *Per Cur.* The mistake in the venue being reasonably accounted for; and the offence as laid being of such a particular nature that the plaintiff could not by the amendment proposed be enabled to introduce any new fact in proof not originally within his contemplation; the rule must be made absolute.—*Rule absolute.* See 6 T. R. 171. 543; 7 id. 55.

5. DOVER v. MESTAER. H. T. 1804. K. B. 4 East. 435.

This was an application similar to the one in the preceding case of Petre v. Croft. The affidavit stated that the plaintiff, intending to sue the defendant for bribery at the last election for the borough of Heydon, laid the venue in Yorkshire, supposing that all the acts of bribery and solicitation (some of which took place within the inferior jurisdiction of the county of the town of Kingston upon Hull,) were proveable in Yorkshire, where the election took place; that notice had, in fact, been given to go for acts of bribery in Hull, as well as in Yorkshire; and that the mistake was not perceived till after the cause had gone down to trial. *Per Cur.* It has been already decided that where there has not been any unnecessary delay on the part of the plaintiff in the

prosecution of a penal action, an amendment will be permitted; the cause of action being in truth the same; although such amendments do often amount *pro tanto* to giving a new action after the time limited by the statute. Upon the plaintiff, therefore, undertaking not to bring any new action in Yorkshire, which he is yet within time to do, and which he now abandons upon this record by the amendment proposed; we must make the rule absolute.—*Rule absolute.*

6. *AYRES v. BUSTON*. M. T. 1815. C. P. 2 Marsh. 121; 6 Taunt. 408.

A rule *nisi* had been obtained to change the venue in an action brought to recover a certain sum awarded by the commissioners under an enclosure act to be paid by the defendant, from Bedford to Middlesex, it was contended that the action depended entirely on the construction of an act of parliament, which would be better tried in the metropolis than at Bedford. *Per Cur.* The defendant swears that the cause of action, if any, arose in the county of Bedford; that is a sufficient reason to induce us to discharge this rule.—*Rule discharged.* See *Str.* 1162. 1202; 4 *East.* 433. 435; *Barnes.* 12.

6. *LEWIS, GENT. ONE, &c. v. SHELLEY*. M. T. 1816. C. P. 2 Marsh. 426; 7 Taunt. 146.

The plaintiff, who was an attorney residing in the country, sued by attachment of privilege. His agent in London, however, laid the venue in the country instead of in Middlesex, as he was instructed. A motion was now made to change the venue. *Per Cur.* The plaintiff having waved his privilege of laying his venue in Middlesex, the adoption of which mode of proceeding would have been an inconvenience to the defendant, who resided in Kent; and having laid his action in that county where, in respect to the defendant, it ought to be laid, we must refuse the rule. In *Cooke v. Sheen* (*Barnes.* 12.) which has been cited, the plaintiff would have been nonsuited had the amendment not been granted, as the action was confined to Middlesex. *Rule refused.*

that he might have given it in evidence in the action laid in the original county.

[524]
And the Court will not allow an amendment by changing the venue, unless on substantial grounds.

As where in an action by an attorney the venue was laid in the country instead of Middlesex, this the mistake of his agent,

(c) *In the name and description of the parties.*

1. *NURSE v. FRAMPTON*. M. T. 1693. K. B. Comb. 299.

This declaration alleged that it was agreed by a note between the plaintiff and defendant that there should be a horse-race, and that a certain horse of the defendant's should run with, &c. under a forfeiture of 25*l.* on either side. It was contended that it did not appear who were the parties to the deed, or whose horse it was. *Skidmore v. Vandestoën*, 2 Inst. 673; S. C. Cro. Jac. 56. was relied on. *Per Holt, C. J.* That case was decided upon another reason, being by indenture; but here it should have been averred, that the note was subscribed by the parties; but it appearing only to be the default of the clerk, it was ordered to be amended.

A declaration may be amended by inserting the parties' names to an agreement;

2. *BROWN v. SHIPTON*. H. T. 1733. C. P. *Barnes.* 5.

Upon a common *clausum fregit*, plaintiff declared against defendant as administrator, and he pleaded that administration was never committed to him; the plaintiff applied for leave to amend his declaration upon payment of costs, by declaring against defendant as executor; which was ordered.

Or describing the special character in which the party sues.

(d) *In the form and cause of action.*

1. *BROWN v. HOLFORD*. M. T. 1697. K. B. 12 Mod. 248.

In an action on a penal statute, the sum was mis-stated in the declaration; the Court gave leave to amend, the writ being general.

2. *BILLING ASSIGNEE OF BURKITT AND HAWKES, v. FLIGHT*. M. T. 1815. 3 Marsh. 124; 6 Taunt. 419.

In an action brought for money lost by a bankrupt, by stock-jobbing, under 7 Geo. 2. c. 3. a bill had been filed in a court of equity in order to discover certain facts with reference to the transaction, to which bill the defendant pleaded that he was not bound to answer, because the plaintiff had declared in *assumpsit* instead of debt. It appeared that the plaintiff had entered into a peremptory undertaking to try the action at the adjourned sittings after Michaelmas term. A rule *nisi* was, under these circumstances, obtained to by stock-

[525]
If the penalty in an action on a penal statute be mis-stated it is amendable. And where in an action of *assumpsit*, on 7 Geo. 2. c. 3. § 2 for money lost by stock-

jobbing, a bill of discovery enlarge the time for trial until the sittings after next Hilary term, on the ground that he could not go to trial until he had obtained the defendant's answer, and to amend the declaration, by changing it from *assumpsit* to debt. *Per Cur.* The plaintiff has been precluded from bringing his action by the laches of the defendant himself; viz. by his not having answered the bill of discovery; and as to the amendment prayed, we are of opinion, that as no new cause of action is introduced, but merely an alteration required in the beginning and end of the formal parts of the declaration, we must make the rule absolute. *See* 6 T. R. 171; 7 id. 184.

3. BILLING V. POOLEY. M. T. 1816. C. P. 6 Taunt. 422; 2 Marsh. 125. n. a. S. C. This was an action of *assumpsit*, similar to the preceding case, in which a similar amendment was prayed, by changing it from *assumpsit* to debt. A bill in equity for a discovery had been prepared, but not filed. The Vice-Chancellor had since over-ruled the defendant's objection, as stated in the previous case with reference to answering the bill of discovery. The plaintiff had, however, obtained a rule *nisi* to amend the declaration, by converting it to debt. *Per Cur.* The amendment may be allowed; as it is doubtful whether *assumpsit* could be supported on the statute; and as it will not be in any wise prejudicial to the defendant.—*Rule absolute.*

4. LEVITT V. KEBBLEWHITE. H. T. 1816. C. P. 6 Taunt. 483; 2 Marsh. 185. S. C.

The defendant has been arrested on a *capias*, with an *ac etiam* clause in debt, but a declaration had been afterwards filed in *assumpsit*. On these grounds a rule *nisi* had been obtained on the part of the defendant to discharge him on filing common bail, and a counter rule had been also obtained by the plaintiff to amend the declaration. *Per Cur.* The general principle which has governed the courts in granting amendments of this description has been, to enable the plaintiff, by means of the amendment, to maintain his action, and thereby to prevent his being totally precluded by such errors from appearing successfully in court. But here the plaintiff may succeed as well in case as in debt. The only inducement to amend is to charge the bail, who are released by the present irregularity. Let the rule to cancel the bail bond be therefore made absolute, and the rule to amend be discharged. process issued being in debt, the Court refused to amend, and made the rule to cancel the absolute.

(e) In the damages.

HUXSER V. GAPAN. T. T. 1722. K. B. 8 Mod. 176.

In trover for a ring, the defendant moved for leave to bring it into court, and that it might be struck out of the declaration; the application was refused. The plaintiff then moved for leave to amend his declaration, and add more counts to it, having only declared for 15*l.* damages; the application was opposed, but the Court ultimately granted it.

(f) In the conclusion and pledges.

1. MASON V. LITTLEHALES. E. T. 1738. C. P. Barnes. 11.

The court gave leave to amend the declaration by striking out the words "brings suit," and inserting "prays relief," upon payment of costs, though the Court seemed to think the amendment was unnecessary. *See* And. 247; 2 Chit. Pl. 29. n.

2. WOOD V. BOON. M. T. 1748. C. P. Barnes. 20. S. P. PFNVOLD V. THOMLINSON. T. T. C. P. Barnes. 356.

This was an application to amend the declaration, by adding pledges to prosecute, and a memorandum making the declaration agreeable to the bill on record on payment of costs. Rule absolute.

3. SPENCER AND ANOTHER V. THOMLINSON. E. T. 1751. C. P. Barnes. 167.

Plaintiffs concluded their declaration "and therefore they bring suit," &c. instead of "pray remedy," &c.; defendant demurred, and showed said conclusion for cause; plaintiff joined in demurrer. On argument, the Court inclined to think either of these ways of concluding good; but for the sake

bill of discovery
having been filed,
which the defendant
refused to answer,
because the discovery
was given by the statute
in debt only, an amendment
was allowed by changing it
from *assumpsit* to debt.
So a similar amendment was
allowed where no bill of discovery
had been filed.

[526] But where a motion had been made to cancel the bail bond on the ground that the declaration was in case, the bail bond A declaration in trover may be amended by adding a new count and increasing the damages.

A declaration amended by substituting *prays relief*, instead of *brings suit* Or by adding making the memorandum agree with the bill. A wrong conclusion to a declaration is amended.

of keeping up to the old constant form of prays remedy, &c. proposed an amendment without payment of costs.

2dly. WITH REFERENCE TO THE TIME OF THE AMENDMENT.

(a) After plea in abatement.

1. *LEPARA v. GERMAIN*. E. T. 1702. K. B. 1 Salk. 50; S. C. 2 Ld. Raym. 859. *Assumpsit*, declaration against Sir John Germain, Knt. The defendant pleaded in abatement that he was a knight and baronet. The plaintiff replied he was a knight, &c.; and on motion to amend upon payment of cost, all being in paper, and that the action being by bill, the addition was not material, not being within the statute of additions; but denied to amend, because nothing to amend by, and the defendant had taken advantage of the fault.

able, as, prays remedy, &c. instead of therefore they bring suit, &c. [527] Formerly after a plea in abatement, the declaration was not amendable;

2. *GARNER v. ANDERSON*. M. T. 1706. K. B. 1 Stra. 11.

In a replevin, out of the county court, the plaintiff declared for taking his cart and four horses in Nightingale-lane, in the parish of Stepney. The defendant pleaded in abatement, that he took the goods in Nightingale-lane, in the parish of St. John, Wapping; *absque hoc*, that he took them in Nightingale-lane, in the parish of Stepney, and set forth his title to the goods as a deodand. On a motion to amend the declaration, and allege the place to be in the parish of St. J. W.; one side of the lane, to the causeway, being by act of parliament in the parish of S. and the other side in the parish of St. J. W. and the goods were taken on that side of the lane which was in St. J. W. On the other side it was contended, that if this should be amended, all pleas in abatement will be set aside. *Per Cur.* In the case of *Lepara v. Germain*, 1 Salk. 50. it was held that there could not be any amendment, because the commencement of the suit was wrong, and nothing to amend by. The foundation of amendments by the Court, whilst the proceedings remain in paper, before they are recorded, is, that these papers, delivered to and fro, supply the place of declaring and pleading by word of mouth at the bar, and may be amended as easily as if delivered there. These faults, styled errors of the clerk, are amendable after the proceedings are recovered. Afterwards the Court granted leave to amend upon payment of costs. See *Haliday v. Pitt*, *Ca. Temp. Hard.* 44.

But a different rule now obtains.

3. *REX v. SEAWARD*. H. T. 1726. K. B. 2 Stra. 739; S. C. 2 Ld. Raym. 1478. Information against defendant for sending a challenge. The defendant pleaded that he was a surgeon, and not a gentleman; and, after argument, the Court gave leave to amend the information upon payment of costs.

And it may be amended after a plea of misadmission;

4. *MESTAER, qui tam, v. HERTZ*. H. T. 1815. K. B. 3 M. & S. 450; S. P.

OWEN v. DUBOIS. T. T. 1798. K. B. 7 T. R. 698.

The defendant had pleaded a misnomer in abatement to an action for penalties upon the statute of usury. A judge at chambers had made an order for amending the bill and declaration, by the insertion of the real name, on the payment of costs. A rule was obtained to set aside the order for irregularity.

Or of a misnomer. [528]

In showing cause against this rule, it was argued, that the order made by the learned judge was perfectly consonant with the ordinary practice, and, that as such amendments were usually made at chambers, recorded precedents of such indulgence could not of course be found. For the other side it was observed, that if these indulgences were always conceded, pleas of misnomer in abatement would be virtually abrogated, and that an advantage would be taken from the defendant of which he was once in legal possession.

Per Cur. The defendant having appeared and pleaded a misnomer, the plaintiff has obtained something to amend by; he is entitled to apply to rectify his mistake, instead of encountering the peril of an issue on the misnomer, which probably would have turned out against him, and would have been conclusive. Nor do we perceive any vaild distinction between an application to amend the name, and to amend any other part of the declaration. Applications of this nature have been made and allowed, where the proposed alteration went to much more material facts, such as dates or names, on which the gist of the action depended.—*Rule discharged.*

See *Turvil v. Aynworth*, 2 Stra. 787; S. C. 2 Lord Raym. 1515.

A declaration may be amended by changing the venue, though after plea pleaded. In covenant for rent, the word *annuatim* may be inserted after plea pleaded. After the delivery of the paper book to the clerk of the papers with a memorandum generally of M. T. corresponding with the declaration, it cannot be amended by either party, by making a special memorandum without an order from the Court.

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Pledges may be inserted in a declaration after demurrer, and joinder therein. Or other defects supplied, on the condition of paying costs.

Semb. alter in penal actions

(b) After plea in bar, or delivery of the paper book.

1. SOUTHAM v. JENNINGS. M. T. 1737. C. P. Barnes. 6.

This was a *testat' capias* from London into Oxfordshire, and bail put in thereon with the filacer of London; plaintiff by mistake declared in Oxfordshire, and afterwards moved in the Treasury to amend by declaring in London according to his writ, which was ordered upon payment of the costs, though after plea pleaded.

2. RYMES v. BARKER. H. T. 1605. K. B. T. Raym. 160.

In covenant the plaintiff declared that he demised to the defendant certain lands for a certain term, at a certain rent, without saying *annuatim*. The defendant pleaded *non est factum*; and after verdict for plaintiff, he amended his declaration by inserting the word *annuatim*. Upon which the defendant moved to have the amendment examined. *Per Cur.* The addition of *annuatim* is no more than what was implied before; the defendant ought to have demanded *oyer* of the deed, and now, he having pleaded *non est factum*, he is not prejudiced by the amendment, and therefore let the amendment stand.

3. CLEMENTS v. STERLING. E. T. 1819. K. B. 1 Chit. Rep. 336.

The paper book in this cause had been obtained by the plaintiff's attorney from the clerk of the papers, with a memorandum generally of Michaelmas term, corresponding with the declaration. The plaintiff's attorney altered the memorandum to the 27th of November, without the permission of the clerk of the papers, or any order to amend, and delivered the same to the defendant's attorney, who thereupon restored the paper book to its original state, and returned it. The plaintiff's attorney, however, said, that he should again insert the special memorandum; upon which a rule was obtained by the defendant that the paper book might be restored to its original state; and that the plaintiff might pay the costs of the application. *Per Cur.* The alteration was a very improper act, and although the plaintiff has not persisted in such alteration, he gave the defendant's attorney ground to believe that he would, and by that conduct compelled him to apply to the Court.—Rule absolute.

See 7 T. R. 473; 8 id. 2552.

(c) After demurrer.

1. HARDY v. GILDING. H. T. 1680. C. P. 3 Lev. 39.

On demurrer to a declaration for words, the want of "pledges," was assigned for cause. After joinder in demurrer, a motion was made for leave to amend, which the Court granted upon payment of costs. See 18 Ed. 4. c. 9; Hutt. 92; 4 Anne, c. 16; 6 Anne, c. 10.

2. DAVIE v. ATKINSON. E. T. 1739. C. P. Prac. Reg. 19. S. P. ANON. H. T. 1675. 2 Mod. 167.

Declaration in debt on a recognizance of bail, setting forth that if the plaintiff should recover, &c. the principal defendant should pay, &c. or render his body on that occasion to the prison of the fleet. In assigning the breach, the plaintiff averred that he did recover, &c. but that the principal defendant did not pay, &c. or render his body to the said prison in execution of that judgment. The defendant, the bail, demurred; the plaintiff joined in the demurrer; and after one argument, and an *alterius concilium* ordered, moved to amend his declaration by striking out the words "in execution of the judgment," and inserting the words, "upon that occasion;" the render, as well before judgment as after, being upon the mesne process, the plaintiff having his election either to charge the defendant in execution, or proceed by *feri facias* or *elegit*. The Court thought the amendment necessary, and gave the plaintiff leave to amend, on payment of costs.

3. WALKER, *qui tam*, v. LAUGHTON. M. T. 1712. K. B. Fortescue. 277.

On a motion to amend the declaration on the statute of Anne for usury, the defendants having pleaded a plea in abatement, to which the plaintiff had demurred; there were two defects in the declaration; first it should have been the *action accrued*; the word *action* was omitted, and the whole of the allegations respecting the sum claimed were incorrect, and different from the

sums said to be forfeited. *Per Cur.* All is in paper; this may be amended; A declaration indeed if there had been such an amendment as would alter the action, then we would not allow them to amend, because another person might have brought the action as the applicant would mend it. *Vide post, tit. Demurrer.*

4. BROWN v. CRUMP. T. T. 1815. C. P. 1 Marsh. 609; 6 Taunt. 300; S. C. MS. E. T. 1820. S. P.

The defendant having demurred to the declaration, as not showing a sufficient consideration, the plaintiff had obtained leave to amend by adding three new counts, wherein he alleged the same promises, but varied the statement, so as to obviate the objections taken. A rule *nisi* had been obtained to strike out the three additional counts, on the ground that the Court had only given leave to amend the count demurred to, and that more than two terms had elapsed since the commencement of the action. *Per Cur.* If the plaintiff's counsel had prayed liberty to insert these counts, we should have given it after the demurrer, with this qualification, that the alteration should only consist in an amendment of the manner of stating the *consideration*, so as to meet the views of the defendant. No new undertaking or material alteration in the statement of the original promises, laid to have been given by defendant, ought to be allowed. But as in this case the *manner* of stating the *consideration*, and not the *contract itself*, seems to have been varied, we must discharge the rule.—*Rule discharged.* See *Say*. 234; 5 *T. R.* 373; 6 *id.* 544. 698; 7 *id.* 55; 2 *Str.* 890. 1162; 2 *Burr.* 1098; 1 *Wils.* 7. 256; 6 *Taunt.* 300; 1 *Tidd.* 742-3. 7th edit.; and *post, tit. Demurrer.*

5. BISHOP v. STACY. M. T. 1733. K. B. 2 *Str.* 954.

After a special demurrer, joinder, and argument, the plaintiff had leave to amend by the bill on the file. See 2 *Saund.* 402; *Ca. Temp. Hard.* 42; 2 *Str.* 735. 976; 2 *Doug.* 330; 1 *East.* 372; *id.* 391; 1 *H. Bl.* 36.

6. KINDER v. PARIS. M. T. 1795. K. B. 2 H. B. 561.

On an application for an amendment by a party who had once amended, on a demurrer, *Per Cur.* We cannot give leave to amend again on a second demurrer. *Sed vide Barnes v. Eyles, post, 531.*

7. COOKE v. BIRT. M. T. 1814. C. P. 5 Taunt. 764; S. C. not S. P. 1 Marsh. 333.

In an action brought against the sheriff for breaking and entering the plaintiff's dwelling-house, &c. it appeared that the sheriff, under a writ of *fi. fa.* issued against the goods of an intestate, entered into the house of the administratrix, in whose possession, or in the possession of her husband in her right since her marriage, the goods were placed, in order to search for the goods of the intestate. After a demurrer to a justification, stating these facts, had been argued, the plaintiff prayed to amend, but the Court refused to grant the application.

8. BARNES v. EYLES. T. T. 1818. C. P. 2 Moore. 561; 8 Taunt. 512. S. C.

This was an action against the warden of the Fleet for an escape. The bill alleged that the party had been brought to the bar of this Court by virtue of a writ of *habeas corpus*, and had been by the Court recommitted to prison in execution, "as by the commitment more fully and at large appears." On special demurrer, assigning for cause that the bill contained no averment that the commitment was of record, judgment was given for the plaintiff. Another amendment was afterwards prayed, on the ground that the case of *Turner v. Eyles*, 3 B. & S. 463. which had been relied upon by the Court in giving their judgment, was distinguishable from the present, as here the objection was raised by special demurrer, whereas in *Turner v. Eyles* it was not taken till after verdict. The plaintiff's counsel, admitting the validity of the objection, requested leave to amend on payment of costs. It was objected that the plaintiff having amended once before on a demurrer, could not amend again on a second demurrer. *Sed per Cur.* Under the circumstances of this case, and more especially as we have already given our judgment in favour of the plaintiff, we will allow the amendment, on payment of costs up at large

A declaration demurred to was amended by the addition of new counts which contained no fresh cause of action, but only varied the manner of stating the facts so as to obviate the demurrer; held good, even after two terms from the commencement of the action. Notwithstanding special demurrer, joinder, and argument, the plaintiff may amend. But no amendment can be made on a second demurrer.

After the arguing of a demurrer to a justification in an action of trespass against the sheriff, the Court would not permit the plaintiff to amend.

[531] Where the bill in an action on an escape averred the commitment of the prisoner by the Court of C. P. "as by the commitment more fully and at large

appears," to the time of the argument. See 2 *Stra.* 1226; 1 *Lev.* 211; *S. C.* 2 *Keb.* 206; 1 *Sid.* 330; 3 *Burr.* 1841; 1 *Lord Raym.* 35; *S. C.* 2 *Salk.* 565; 5 *Mod.* 8; *Willes.* 127; 5 *East.* 440; 2 *H. Bl.* 561; *Mod.* 235. because the bill did not allege the commitment to be of record; the plaintiff had leave to amend on payment of costs.

Semb. Formerly new counts might be added to a declaration after the second term;

As where a declaration by executors stated a promise to their testator, and issue was joined on a plea of the statute of limitations the Court, after two terms, permitted the plaintiff to amend by laying the promise to have been made to themselves.

[532] But the general practice is opposed to such amendments; * Though other amendments, not introducing a new cause of action, may be made, even against a prisoner. Unless it be a penal action. Hence in an account of debt on 32 G. 2. c. 28. for extortion by a sheriff's officer, the Court will not allow an amendment of

(d) After second term.

1. GARWAY v. STEVENS. E. T. 1747. C. P. Barnes. 19. S. P. WITHERS v. BAKER. M. T. 1709. K. B. 11 Mod. 198. S. P. GREAME v. BELL. T. 1736. C. P. Prac. Reg. 18.

The plaintiff moved for leave to add a new count to his declaration, which was entitled of last Michaelmas term, on payment of costs. Defendant objected that a count could not be added after the second term, which was admitted to be the practice; but as plaintiff might discontinue, and thus save the trouble of a new action, the rule for the amendment was made absolute on the terms prayed.

2. THE EXECUTORS OF THE DUKE OF MARLBOROUGH v. WIDMORE. H. T. 1730. K. B. 2 *Stra.* 890; *S. C.* Fitz. 193; 1 *Barnard.* K. B. 308. 418. S. P. TENOUR v. SMITH. E. T. 1754. K. B. 1 *Kenyon.* 141.

The plaintiffs declared as executors on a promise to their testator, and issue was joined on a plea of the statute of limitations. The plaintiffs moved to amend by laying the promises to have been made to themselves, and cited 3 *Lev.* 347. where, in an action upon the stat. of hue and cry, the allegation of the oath was amended, and laid to be by the servant instead of the master. On the authority of this case, the Court ordered the amendment, on payment of costs, and liberty for the defendant to plead *de novo*.

3. AUBES v. BARKER. M. T. 1746. K. B. 1 *Wils.* 149.

It was moved on behalf of the plaintiff to amend his declaration by adding two counts; this application was made in the term next after that in which the declaration was delivered, and after the defendant had pleaded. *Per Cur.* It is a rule of the Court that a count cannot be added after two terms, and the term in which the declaration is delivered is always included. As to the case of the Duchess of Marlborough v. Widmore, 2 *Stra.* 890. the amendment in that case was allowed for a particular reason, for if it had not been there permitted, the action would have been lost by the running of the statute of limitations. See *R. M.* 10 *Geo.* 2. sess. 2; and *Say. Rep.* 97. 151. 234.

4. OWENS v. DUBOIS. T. T. 1798. K. B. 7 T. R. 698.

The defendant, after pleading two several pleas of misnomer in abatement, was entitled to be discharged, on the ground that the plaintiff had not declared within two terms. The plaintiff moved to amend the declaration by striking out one of the names. *Sed per Cur.* As this motion is merely to amend by striking two words out of the present declaration, the amendment may be made; but when done it must be considered as a declaration from the time when it was first filed.—*Rule absolute, on payment of costs.*

5. RANKIN AND OTHERS v. MARSH. M. T. 1738. K. B. 8 T. R. 30.

This was a penal action for usury by the assignees of a bankrupt. The writ issued in Trinity term, returnable in M. T.; the declaration was delivered the latter end of April, when defendant imparled to the following Trinity Term, and after issue joined, plaintiffs moved to amend their declaration; but *Per Cur.* The plaintiffs having proceeded so dilatory in this case, we cannot permit the amendment.

6. WRIGHT v. AGER. E. T. 1821. C. P. 5 Moore 330.

The declaration had in this case been framed on the statute of 32 *Geo.* 2. c. 28. to recover penalties from the defendant, a sheriff's officer, for extortion. A motion was now made to amend it by adding new counts upon the 23 *H.* 6. c. 9. It appeared that two terms had elapsed since the return of

* The modern practice of all the Courts is to permit a new count to be added after the end of the second term, when the cause of action is substantially the same, though not for a different cause of action. *MS.* E. T. 1820. cited 2 *Arch. Prac.* K. B. 236. The principle upon which this rule has been adopted is, that as the plaintiff would have been out

the writ. *Per Cur.* The statute 23 H. 6. c. 9. is nearly obsolete. The plaintiff has made his election to sue on 32 Geo. 2. c. 28. We must refuse to accede to the present motion. *See 2 Marsh.* 59.

7. FREERE AND ANOTHER, ASSIGNEES OF YOUNG, BANKRUPT, v. COOPER. M. T. 1815. C. P. 2 Marsh. 59; 6 Taunt. 358. S. C. S. P. BROWN v. CRUMP. T. T. 1815. C. P. 1 Marsh. 609; S. C. 6 Taunt. 300.

In an action for a rescous of goods distrained for rent due to the bankrupt, the declaration stated the aggression to have been committed in the time of the plaintiffs. It appeared, however, that the wrong had been done during the possession of the *provisional* assignee. After the lapse of two terms a motion was made to amend the declaration by adding new counts, similar to what had been already inserted, but adapted to this state of facts. *Per Cur.* Rule absolute, on payment of costs; and the defendant to be at liberty to plead *de novo*. *See Barnes.* 19.

committed to their possession, was amended after two terms by the addition of new counts similar to the original ones, but stating the *tort* to have been to the possession of the *provisional* assignees, according to the truth.

8. HORSTON v. SHILLITER. H. T. 1822. C. P. 6 Moore. 490.

The declaration, in an action for breach of promise of marriage, stated in the first count a promise by the defendant to marry on request; the second count to marry within a reasonable time; and the third to marry generally. A rule had been obtained to amend the declaration by the addition of a new count, viz. to marry on a particular day. It appeared that the writ was returnable in Easter Term last, and the declaration had been filed as of that term. *Per Cur.* Let the first count be amended by striking out the promise to marry on request, and introducing a particular day therein; and let the costs of the application abide the event of the cause.—Rule absolute. *Sec 2 Tidd.* 7th edit. 730; 2 D. & R. 55.

ry within a reasonable time; 3d. to marry generally. An application to amend by insert count to marry on a particular day was granted on terms.

(e) *After issue joined.*

1. SIR WILLIAM TURNER'S CASE. H. T. 1675. C. P. 2 Mod. 144; S. C. Freem. 221.

Debt, *qui tam*, &c. against defendant, being a justice of the peace in London, for denying his warrant to suppress a seditious conventicle. A motion was made to amend the declaration in the description of the house complained of. *See per North, C. J.* After issue joined, and the cause set down for trial, no precedent can be shown of such an amendment in a penal action. The application must be refused, though the plaintiff may discontinue upon payment of costs. *See Stra.* 185; 3 T. R. 349; 11 Mod. 198; *Stra.* 185; *Doug.* 114; 2 T. R. 707; 10 Mod. 88; 12 Mod. 107; *Fitz.* 193.

2. BEARECROFT v. THE HUNDREDS OF BURNHAM AND STONE. H. T. 1692. C. P. 3 Lev. 347.

The plaintiff, receiver-general of taxes, sent by the Worcester carrier 4000l. under the care of several servants. The vehicle was robbed in the hundreds of B. and S. The plaintiff declared against the hundred for an assault and robbery of himself, he being then 50 miles from the place where the aggression was committed. The cause, after being set down for trial, and, after the jury had appeared, was put off, on the ground of other business. Before the day of trial, a motion was made for leave to amend the declaration by inserting that the robbery was on the servants, and on oath made by the servants. *Per Cur.* Let the amendment be made. *See 2 T. R.* 708; 4 T. R. 228; 6 T. R. 543; 1 T. R. 782.

3. COOKE v. SHONE AND OTHERS. T. T. 1739. C. P. Prac. Reg. 20.

Action on the stat. 9 Geo. 2. c. 29. against the Westminster Bridge office of Court at the end of the second term, if he had not declared at all, so the Court will not suffer him to declare upon a fresh cause of action after that time has elapsed; but where the cause of action is substantially the same, the adding of a new count does not alter the legal situation of the defendant, and consequently allowed. *See 2 Marsh.* 60.

cers. Motion to amend the declaration after issue joined, and cause entered, by making the venue Middlesex instead of London. *Per Cur.* As this is a plain mistake, the statute having directed the action to be brought in Middlesex, let the amendment be made on payment of costs. *Sed vide post, Venue; 2 Stra.* 854; *Say.* 207; *1 T. R.* 781; *3 Burr.* 1654; *Cowp.* 511; *1 Taunt.* 58.

Or in the name of the parties.

4. GARDNER V. WALKER. T. T. 1796. Ex. 3 Anst. 935.
After issue joined, it was ascertained that the plaintiff's christian name had been mistaken.—Leave given to amend.

And an amendment may be made in an action on a penal statute, even after record has been made up and carried down to trial;

5. MACE, *qui tam*, v. LOVETT. H. T. 1771. K. B. 5 Burr. 2833
This was a *qui tam* action on the statute of usury. The record had been made up ready for trial, but it was withdrawn by the plaintiff's attorney upon his discovering a mistake in the declaration respecting the sum stated to have been lent. A motion was made for leave to amend the declaration by altering the amount from 100*l.* to 88*l.* It was urged that all the proceedings being in paper, the cause never had been tried, and that till verdict they were not considered as being upon record. *Per Cur.* We are satisfied that in this case the amendment may be made, though we have gone a great way in allowing amendments towards the attainment of justice. There is no distinction between *qui tam* actions and civil actions, where an amendment at common law is applied for; but the Court will never alter the declaration so as to change the liability of the party sought to be charged. Here, however, the amendment prayed will not have that effect; it is to lessen the amount, not to increase it.—The amendment granted, upon payment of costs.

Or after the cause had been carried down by proviso and postponed.

6. FRENCH V. WHITFIELD. T. T. 1736. K. B. And. 13.
This was an action on the statute of 10 & 11 W. 3. c. 17. for keeping a gaming-house; to which the general issue was pleaded. The cause having been carried down by proviso, but afterwards postponed, the Court was moved for leave to amend the declaration, by inserting Convent-garden instead of Covent-garden, and striking out the letters, at the end of the word Paul's, and for making other alterations of a similar kind. On the part of the defendant it was argued that the cause having been carried down by proviso, it rendered the case materially different from all other actions where amendments had been allowed, as that circumstance showed great laches in the plaintiff. *Per Cur.* This case does not, in our opinion, materially differ from others. The cause being carried down by proviso does not affect the ordinary rights of the parties. The amendment must be allowed, the defendant being at liberty to plead *de novo*.

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And a *qui tam* action was amended as to the description of the persons to whom a moiety of the penalty was given, no unnecessary delay having occurred on the part of the plaintiff; But never where new counts are proposed to be introduced;

7. SOLOMONS V. JENKINS. E. T. 1815. K. B. 2 Chit. Rep. 23.
In this action the writ had been issued in Michaelmas Term, returnable on the 22d of November. The declaration was delivered on the 4th of January, 1815, to plead in the first four days of Hilary Term. A plea had been put in in due time, when, on making up the issue in the present term, it was discovered that a mistake had occurred in the declaration. The statute 13 Geo. 2. c. 19. s. 6. prohibiting illegal horse-races, enacts, that one moiety of such penalties as shall be incurred by, and recovered of, any persons within the county of Somerset, shall go and be applied to and for the use and benefit of the poor persons admitted into the hospital or infirmary erected in the city of Bath, for the benefit of the poor persons resorting to the said city for the benefit of the mineral waters there. The declaration in this case, which was founded on the preceding statute, laid the facts to have been committed in the county of Somerset; but instead of describing the moiety of the penalty to be recovered, as being applied in the manner described in the statute, the declaration had these words, "for the poor of the parish of Walcot, in the city of Bath." A rule nisi was therefore obtained to amend. *Per Cur.* There having been no unnecessary delay in this case, the rule may be made absolute.—*Rule absolute.* See 7 *T. R.* 55.

8. COOPER V. MIDDLETON. M. T. 1728. C. P. Prac. Reg. 16.
Motion to amend declaration by adding two new counts denied, because

9. HARMAN V. LANE. H. T. 1739. C. P. Prac. Reg. 19.

On showing cause against a rule obtained by the plaintiff for amending the declaration after issue joined, after several notices of trial given, it appeared that the amendments included a new cause of action. The Court discharged the rule. Or a new cause of action;

10. POITVIN V. TREGEAGLE. T. T. 1702. K. B. 2 Lord Raym. 771.

The plaintiff had sued out a *latitat* against the defendant, and in the same term declared against him, and afterwards delivered a declaration by the bye. The defendant pleaded *non assumpsit*. Issue being joined, and notice of trial given, the plaintiff discovered that his christian name had been mistaken. The cause having been inserted in the paper, the plaintiff moved for leave to amend, and urged, that such amendment might well be granted, notwithstanding it was a declaration by the bye; for since the delivery of the declaration was regular, it must be esteemed a valid declaration to all intents and purposes, and would partake of all advantages that other declarations possessed; that it was in effect founded on the *latitat* in the other action, and therefore the name of the plaintiff might be amended by it; that the amendment would not operate prejudicially to the defendant, because if he be nonsuited by the wrong name, he could not levy the costs on him by his right appellation; but *Powys and Gould, Justices*, held that such amendment could not be granted, there being no writ by which the declaration could be rectified. Or a misnomer in a declaration by the bye.

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(f) After verdict or * nonsuit.

1. DENNIS V. EDWARDS. M. T. 1684. K. B. Comb. 4.

After verdict, in an action for assault and battery, it was moved in arrest of judgment that the declaration described the injury by way of recital *de placito quare cum, &c.* But the Court ordered it to be amended. *See 2 Salk. 636; 1 Stra. 621; And. 282; Com. Dig. Pleader, C. 86; post, p. 539; 2 Chit. Pl. 400. n. c.* A declaration commencing improperly, as by way of recital, may be amended after verdict;

* When there is any defect, imperfection, or omission in any pleadings, whether in substance or in form, which would have been a fatal objection upon demurrer, yet, if the issue joined be such as necessarily required on the trial proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give the verdict, or the jury would have given it, such defect, imperfection, or omission, is cured by verdict at common law, or, in the phrase often used upon the occasion, such defect is not a jeofail after verdict; 1 Saund. 228; see Cro. Jac. 44; Cro. Car. 497; 2 Show. 233; Lord. Raym. 487; Hob. 78; Carth. 304. 389; 1 Mod. 292; 1 Lev. 308; 1 Vent. 109; 1 Sid. 218. 423; 1 Salk. 130. 163. 165; 1 Comyns. 116; 6 Mod. 302; 2 L. Raym. 1214. 1060; Holt. 567; 1 Wils. 1. 255; 2 id. 5; 3 id. 275; 7 Bro. P. C. 555; Cowp. 825; Doug. 658; 4 Burr. 2020; 2 id. 1159; 1 T. R. 141. 145. 545; 3 T. R. 25. 147; 4 T. R. 472; 7 T. R. 518. 523; 2 B. & P. 259. 267.

After verdict, the want of a warrant of attorney, the want of an original writ or bill, or any defects in form therein, mistakes and omissions in pleadings, misjoining of issue, miscontinuances, discontinuance, misawarding of jury processes, and the omission of a *capiat* or *misericordia* in a judgment, are aided by the several statutes 32 H. 8. c. 30; 18 Eliz. c. 14; 21 J. 1. c. 13; and 16 & 17 C. 2 c. 8; see Bul. N. P. 322. 323; and the same defects are now aided after judgment by confession *nil dicit*, or *non sum informatus*, by stat. 4 & 5 A. c. 16. s. 2. provided there be an original writ or bill, and warrants of attorney duly filed. Also all defects in writs, original or judicial, or bills, are aided after verdict by statute 5 Geo. 1. c. 13. Of these the statute 32 Hen. 2. c. 30. extends to penal actions; 2 Stra. 1227; 1 Doug. 115; but there is a proviso in the others that they shall not extend to criminal proceedings, nor to any writ, bill, action, or information, upon any popular or penal statutes other than such as concern the customs and subsidies of tonnage and poundage. See 16 & 17 C. 2 c. 8; 1 Stra. 62; Cowp. 3c2; 3 Salk. 130; 2 Lev. 347; And. 115; Hardw. 409. Although in some of these statutes the Court are directed to amend the defect, yet an actual amendment is never made, but the benefit of the acts is attained by the Court's overlooking the exception; 3 Bl. Com. 487.

The following defects are also cured after verdict by the statutes of jeofails, and after judgment by confession or default by 4 & 5 A. 16. s. 2; mispleading, insufficient pleading of jeofail, or other default or negligence of the parties, their counsellors or attorneys; 32 H. 8. c. 30; lack of averment of any life, so as the person be proved to be alive; 21 Jac. 1. c. 13; want of form in any count, declaration, plaint, bill, suit, or demand; 18 Eliz. c. 14; want of profert, &c. or the omission of *vi et armis* or *contra pacem*, mistaking the christian name or surname of either party, sums, day, month, or year, in any bill, declaration, or pleading, being right in the writ, plaint, roll, or record preceding, or in the same roll or record, wherein the same is committed, to which the party might have demurred, and shown the same for cause, or the want of *prout patet per recordum*, or the

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Or that
"the plain-
tiff is in-
debted to
to the
plaintiff;"

2. PATIRSON V. MILTON. H. T. 1691. K. B. 4 Mod. 162.

The declaration stated that W. P. complains of W. M. being, &c. for that whereas W. P. (instead of W. M.) is indebted to W. P. &c. After verdict for plaintiff, it was moved for leave to amend, the error having originated with the clerk. The Court granted the application, without reference to the statutes of amendment.

3. ANON. T. T. 1737. C. P. 2 Com. 580; S. C. Barnes. 484.

Or a vari-
ance in
the venue,
as "Lon-
don" in
the mar-
gin, and
"Oxford"
in the body
of the de-
claration;

This was a motion to amend the declaration delivered, and the award of the Court thereon. London was in the margin; the facts were laid at *Tame*, in the county of *Oxford*, but the award of the *venire* was to the *sheriffs*, and went to the Sheriff of Oxford, and was tried by a jury of that county; and after verdict it was insisted that this was a mistrial, for being laid in London (London being in the margin,) and the award of a *venire* being to the sheriffs there being but one sheriff, unless in London, it must be intended to the Sheriff of London, and then the Sheriff of Oxford had no authority to return the jury; but *Per Cur.* The award is amendable; for by the stat. 8 H. 6. c. 15. a letter too little or too much is to be rectified, and an award to the Court may be amended; so may *viscomiti Lond. præcipimus tibi*, instead of *vice comitibus Lond. præcipimus vobis*, be amended.

4. TOMLINSON AND ANOTHER V. BLACKSMITH. H. T. 1797. K. B. 7 T. R. 132.

Or in the
amount of
damages.

In an action of *assumpsit* upon a special contract, and for goods sold and delivered, the declaration alleged the first as for 730*l.* and the latter for 1200*l.* concluding to the plaintiff's damage of 100*l.* instead of 1000*l.* the amount intended to be stated; the mistake, however, was not discovered until after the trial; and after the jury had found a verdict of 611*l.* 9*s.* 6*d.* which was entered upon all the counts except the first, on which a verdict had been entered for the defendant. A rule was obtained to show cause why the plaintiffs should not be at liberty to amend the declaration by altering the damages laid from 100*l.* to 1000*l.* *Per Cur.* To make the amendment required without granting a new trial would be very unjust, since the defendant, perhaps, proceeded to trial, relying that no more than 100*l.* damages could be recovered, under the present declaration.—*Rule absolute for a new trial and amendment.*

[538]

An amend-
ment may
be made
even after
verdict has
been set a-
side, on
payment
of costs.
A declara-
tion on a
covenant
to repair,
omitting
an excep-
tion of
"casual-
ties by
fire," is bad
on *non est
factum*, &
cannot be
amended
on pay-
ment of
the costs

5. KNOW V. WYCHEL AND OTHERS. E. T. 1727. C. P. Prac. Reg. 17.

After a verdict had been set aside, the plaintiff moved for leave to amend the declaration on payment of costs. The motion was opposed. *Sed per Cur.* Let the rule be absolute for the amendment, on payment of costs.

6. BROWN V. KNILL. H. T. 1821. C. P. 5 Moore. 164; S. C. 2 B. & P. 395.

The defendant pleaded to an action brought against him for not repairing certain premises, among other pleas that of *non est factum*. The declaration alleged a general covenant to repair. The counterpart of the indenture produced in evidence was to that effect, with the addition of the following qualification, "casualties by fire excepted." A nonsuit had been entered at the trial against the plaintiff for the variance, whereupon a rule *nisi* was now moved for to set it aside, and have a new trial. The Court, however, held that the variance was fatal, the conditional covenant to repair appearing on the face of the declaration to be an absolute one. The plaintiff's counsel then moved to amend on payment of costs. *Sed per Cur.* The plaintiff might have amended before trial. The defendant cannot now be deprived of the benefit accruing from the laches of the plaintiff.—*Rule refused.* See 1 want of a right venue, so as the cause was tried by a jury of the proper county where the action was laid, and which is holden to aid the defect of a mistrial of a local action in a wrong county; 7 T. R. 582; 2 Lord Raym. 1212; Willes. 418; and see 3 T. R. 337; 1 Saund 247; or any other matters of a like nature, not being against the right of the matter in suit, nor whereby the issue or trial is altered; 16 & 17 C. 2. c. 8; see 1 Saund. 247. a. and the cases there cited; also 1 Saund. 241. b. 228 a; 2 Saund. 7. a; 1 Lord Raym. 698; 2 id. 1513; 1391; 2 Wils. 142; Willes. 5. But in no case is a declaration aided by these statutes where the plaintiff either states a defective title, or totally omits to state any title or cause of action in it. A variance in point of form between the declaration and the original or bill is aided after verdict by 21 J. 1 c. 13 and after judgment by confession or default by 4 A. C. c. 16. s. 2; also after verdict all variance between the declaration and the original or bill, whether in form or substance, is aided by 5 G. 1. c. 13.

Lev. 88; *S. C. Sir T. Raym.* 65; *4 Camp.* 20; *1 Stark.* 294; *3 Taunt.* 881.

7. DARTNALL v. HOWARD AND GIBBS. E. T. 1822. K. B. 2 Chit. Rep. 28.

After a nonsuit had been suffered by plaintiff, on account of a variance between the facts proved and stated in the declaration, a motion was made to set aside the nonsuit and amend the declaration, in order that plaintiff might have a new trial, as he was barred by the statute of limitations from bringing a fresh action. After cause had been shown against, the Court made it absolute.

(g) *After judgment.**

1. MOULTWORTH'S CASE. T. T. 1693. K. B. Comb. 287.

The defendant was arrested by the name of *Robert*, and the declaration was in the name of *Richard*. After judgment by *nil dicit*, the Court gave leave to amend the declaration by the bill on the file.

2. BLACKLOCK v. MARINER. T. T. 1736. C. P. 2 Com. 557.

This was an action for an assault and battery on the 1st, 2d, and 3d of April. The first count was for a battery by the defendant on *John Blacklock*; the second and third counts for a battery by the defendant on the said *Samuel*, which was the name of the defendant instead of the plaintiff. A verdict was found for the plaintiff, and entire damages assessed.

On a motion in arrest of judgment, because in this case the plaintiff had apparently recovered damages for the injuries which the defendant had received by the battery on himself, it was contended that this was a mere mistake in the clerk, and aided by the stat. 16 & 17 Car. 2. c. 8. which helps all mistakes of the christian and surname of the parties who are once rightly named before in the same record; and hence as *John Blacklock* is named correctly in the first count, when the subsequent counts say that the said defendant did assault and beat the said *Samuel Blacklock*, there being no such person named before, it is evidently a mere mistake, and may be compared to the cases where the plaintiff declares that the defendant being indebted to the plaintiff, the said plaintiff did promise to ~~pay~~ ^{repay} to the defendant, or *vice versa*, which have always helped after verdict; and of this opinion was the Court.—Judgment for the plaintiff.

3. WILDERY v. HANDY. E. T. 1740. K. B. 2 Stra. 1151.

In trespass after verdict; for the plaintiff it was moved in arrest of judgment, that the declaration stated the injury by way of recital, that whereas, &c.; but a correct bill having been filed (the time of filing the Court refused to enquire into,) and on citing the case of *Smith v. Fuller*, in C. P. Comb. 4. the Court ordered it to be amended, and observed that they were sensible that, for want of applying to amend, many judgments had been unnecessarily arrested.

4. HALL v. DOUGLAS. T. T. 1743. C. P. 7 Mod. 489; S. C. 1 Wils. 99. S. P.

In assault and battery, the plaintiff, in his declaration, recited the original writ, "that the defendant was attached to answer the plaintiff in a plea, wherefore, with force and arms, he made an assault upon the plaintiff, and did him wound, beat, &c." And then the declaration proceeded, and whereupon on the said plaintiff by his attorney complains, "whereas the said defendant on the 8th day of April, with force and arms, made an assault upon the plaintiff, and did beat, wound, &c." There was another count, which stated "and also that whereas;" the declaration concluded, "whereupon the said plaintiff says that he is injured, and has suffered damage to the amount of 50*l.* and whereupon he brings his suit." Upon the general issue being pleaded, the defendant was found guilty. On motion in arrest of judgment, because the declaration was merely recital, and nothing positive alleged against the defendant, it was contended that the judgment ought to be arrested, and *Briggs v.*

* At common law, we have seen (*ante*, p. 504. n.) that the Court may amend in all cases whilst the proceedings are on paper, that is, until judgment signed, and during the term in which it is signed; for until then the proceedings are considered as only in *feri*, and consequently subject to the controul of the Court; though after the term of which judgment is signed, the pleadings, &c. cannot be amended at common law, but by virtue of the statutes of amendments only; *Co. Litt.* 280; *2 Stra.* 1011.

Where plaintiff had been nonsuited on account of a variance, an amendment was allowed, though he was stopped from bringing a fresh action thro' lapse of time. A misnomer amended after judgment *nil dicit*; [539] Or the defendant's name inserted instead of the plaintiff's;

Or in trespass in the K. B. if the declaration begins by way of recital, provided the bill be correct; Or in the C. P. if the original be right.

[540] Sheriff, Cro. Eliz. 507. was cited, which was a writ of error on the judgment in the Common Pleas in trespass for a battery, because the declaration was *quod cum*, and because there was no absolute affirmation of the trespass, but only by inference. It was argued that in an action upon the case such allegation is well enough: the difference being, that in trespass *vi et armis*, a fine is to be paid to the king by the party for a breach of the peace, and therefore the trespass must be positively averred; but in an action on the case, damages are only to be recovered; that the present is not to be compared to actions on contracts, where the consideration is laid by way of recital, "whereas the defendant was indebted to the plaintiff," &c. but even then there follows a positive averment that, in consideration thereof, the defendant promised, &c. and has not performed, &c. *Per Cur.* There are a multitude of ancient cases where the words *quare cum* and *quod cum*, in declaration of trespass, have been held to be fatal; but the judges in modern times have been dissatisfied with the doctrines of those cases, though fearful of directly declaring they were not law, yet very desirous to get over them; they endeavored at a distinction, and it has been three or four times discovered that there is a difference between suits commenced by original in this Court, and by bill in the King's Bench; and though it might be right to arrest judgment in the King's Bench for such a defect as the present, yet it would be otherwise in the Court, because the original is part of the count, and if the original is right, and the count wrong, yet the latter may be helped and amended by the former: but otherwise in the King's Bench, for there the bill is not part of the count, for there you declare against the defendant in *custodia mareschalli*; and though the bill be right, yet if the count be wrong, it cannot be amended by it. But if we were in that court, we would break through that distinction, and we are glad to hear from the bar that they have done so in a late case there, by ordering the bill to be filed, and amending the count by that, for it would be shameful that such an objection as this, after the statute, shall overcome a verdict. As to the distinctions between actions on the case and debt, or why this declaration of trespass of assault, *vi et armis*, is not as well as action upon the case as debt, we cannot tell. The principle we go upon is to prevent the forms of things destroying the substance. If this objection has been assigned specially for cause of demurrer, it might have met with different success; but as it is made after verdict, it may receive a plain answer, because, if there be enough found to give judgment upon, then any defect is aided, and we are of opinion that there is sufficient found to give our judgment according to the justice of the case, the present averment is as good as in all actions of the case, for in such declaration not only the consideration, but even the promise, the foundation of the action, comes by recital, and under a "whereas," and is like the present case. But we shall answer further, that though the averment in the present case is not according to the common form, yet the plaintiff could not obtain a verdict without proving what comes under the whereas at the trial. The declaration is, "whereas the defendant did such a thing to the plaintiff *unde*, he is damaged;" the word *unde* is properly translated, "by reason whereas he received damages," the jury having given damages, and they must be by reason thereof, because there is nothing else stated for them to give damages upon. It is the same thing as though it has been averred at first, but the last first; and suppose the declaration begun, "the plaintiff is damaged in twenty pounds, by reason that the defendant beat him," this would be a good averment; and the present case is like it.—Rule for arresting the judgment discharged.

5. MARSHALL v. RIGGS. H. T. 1752. K. B. 2 Stra. 1162.

[541] Motion in arrest of judgment; the declaration was with a *quod cum*, but the defendant filing a right bill, the Court amended the declaration by it.

6. SHEERS v. BARTLETT. T. T. 1737. C. P. Barnes. 484.

Or by striking out *quod cum*. London was in the margin, but in the body of the declaration the venue was laid in Oxfordshire; plaintiff tried his cause in Oxfordshire and obtained a verdict, and defendant moved in arrest of judgment, insisting that the *venire* or sheriff *facias* being awarded to the sheriffs in the plural number, must signify the

Sheriffs of London, and the Court must take judicial notice that there is but one sheriff of Oxfordshire. *Per Cur.* Had there been no proper venue in the body of the declaration, the margin must have been resorted to; but in this case the margin must be rejected, the word sheriffs for sheriff is amendable, and here the *venire facias* is returned by the Sheriff of Oxfordshire.

7. RICHARDS V. SIMONDS. M. T. 1762. C. P. 3 Wils. 40.

It was moved, after a verdict for the plaintiff at the assizes, that the judgment might be arrested upon an objection that the 4th and 5th counts were bad, because it was alleged in both those counts, that the said Charles (the defendant) sold, &c. to the said Charles (the defendant;) but this being after verdict, the Court rejected the words "to the said Charles" in both the counts, as surplusage, and held them both to be good and sensible, and refused even to grant a rule to show cause. *After verdict for the plaintiff it was objected that the 4th and 5th counts were bad, because it was alleged to the said Charles (the defendant.) sold, &c. to the said Charles (the defendant;) but the Court rejected the words "to the said Charles" in both the counts as surplusage.*

8. HAMON V. LORD JERMYN. E. T. 1697. C. P. 1 Lord Raym. 189.

In an action on the case against the defendant for a false return, the plaintiff declared that he had recovered judgment in C. P. against J. S.; and that he had sued out a *feri facias* directed to the sheriff of S. which had been delivered to him, *qui, virtute ejusdem brevis, et pro executione inde mandavit* to the defendant, *ad tunc capitali seneschallo libertatis de Bury, qui, virtute ejusdem brevis*, levied 20*l.* and made a false return, &c. On not guilty pleaded, a verdict was found for the plaintiff. A motion was made in arrest of judgment, that no mandate to the bailiff was stated, it being only alleged that the sheriff commanded him, but it did not describe what to do. The words *feri faceret* should have been inserted; the mandate of the sheriff being in effect the foundation of the action. For if there was no mandate, the defendant was not bound to execute the writ, and then all the proceedings afterwards could not affect or prejudice him. A motion was made for leave to amend, the error being within the statute 8 H. 6. But *Per Cur.* We must deny the amendment, it being the substantial part of the declaration. And it has never been decided, that where an attorney has mistaken a deed in pleading, or the date of a release, that this has been amended by the deed. No more can the amendment be granted in this case. *But after judgment a declaration cannot be amended in substance.*

3d. WITH REFERENCE TO THE TERMS ON WHICH AMENDMENTS IN THE DECLARATION WILL BE GRANTED, AND PROCEEDINGS INCIDENT THERETO.

1. GARRET V. FOOT. T. T. 1688. K. B. Comb. 133. S. P. REX V. DUKE OF GRAFTON. T. T. 1686. K. B. Comb. 58. WEST V. WEST. H. T. 1608. K. B. 12 Mod. 442; S. C. 3 Salk. 275; S. C. Holt. 559; 1 Ld. Raym. 674.

On an amendment after plea pleaded, the plaintiff hath an election either to pay costs or give an imparlance. See *R. M.* 10 Geo. 2 reg. 2 b. *K. B.*; *Sty. P. R.* 20; *R. M.* 1654. s. 13. *K. B.*; *R. M.* 1654. s. 17 *C. P.* *After plea pleaded, the plaintiff, on amending his declaration, must pay costs, or give an imparlance.*

2. TAYLOR V. BRAMBLE. M. T. 1734. C. P. Barnes. 6.

On a rule to show cause why a declaration should not be amended on giving an imparlance: upon showing cause it appeared that defendant had demurred, and given a rule to join in demurrer; the Court held that the plaintiff could not amend on giving an imparlance, but was bound to pay costs. *And where the defendant had demurred to the declaration, and given a rule to join in demurrer, it was holden that the plaintiff could amend only upon payment of costs.**

3. LEEHILL V. SIR THOMAS REYNELL. T. T. 1732. K. B. 2 Stra. 950. PLACE V. TWIFORD. M. T. 1665. K. B. 2 Keb. 120.

Per Cur. The election in amending to pay costs or give an imparlance, is in the defendant, and not in the plaintiff, and so is the practice of C. P.

See 1 Keb. 175. 428; 2 *id.* 363; 1 *Lit. P. Reg.* 70. 475; *Com.* 58.

* But before plea there are no costs payable upon amending the declaration, except the costs of the application, and the plaintiff may amend his declaration in matter of *form* after a *general issue* pleaded, and before entry, without paying costs or giving an imparlance. The rule stated in the margin must, therefore, be taken with reference to amendments in matters of substance. *The election to accept costs in an imparlance resides with the defendant.*

† If the amendment be in substance after a special plea, the plaintiff must pay costs, although he had rather give an imparlance. *Hullock.* 342; 2 *Stra.* 890. In the C. P. is a *defendant.*

Where the plaintiff gave notice of trial for the assizes, & afterwards obtained a countermand, and then applied for an order to amend the declaration, which term, the

4. JAMES V. KIRK. H. T. 1819. K. B. 1 Chit. Rep. 246. The plaintiff having declared in an action for words, afterwards discovered that the statement of the transaction concerning which the slander was alleged to have been spoken would render him liable to be nonsuited; and being too late to amend, countermanded notice of trial; and afterwards obtained at chambers a judge's order to amend, upon payment of costs, and giving the defendant an imparlance. Upon motion to rescind the latter part of the judge's order, it was holden, that as, upon the introductory matter being altered, the defendant might possibly be able to justify, or at all events materially to alter the shape of his defence, the Court would not deprive him of a right to imparl.

order was obtained on the terms of the defendants having an imparlance till the next term, the Court refused to rescind so much of the order as related to the imparlance.

[543] 5. ATWOOD AND OTHERS V. RATTENBURY. H. T. 1821. C. P. 5 Moore. 209.

Where defendants were arrested on an affidavit by plaintiffs as surviving partners, but the writ and declaration were in an amendment After amendment of declaration defendant entitled to two days in K. B. to plead *de novo*. And where a rule to plead has been entered of the term of the amendment, it is sufficient without a new rule. Though where it is amended in a term subsequent to that in which a rule to plead has been given a fresh rule is necessary. [544] So in the C. P. on amending a declaration the defendant is entitled

A rule nisi had been obtained to discharge the defendant on filing common bail, and to cancel the bail bond. It appeared that the plaintiffs had issued a writ against the defendant in their own names, and had filed a declaration in the affidavit to hold to bail as surviving partners of J. S. The Court gave their opinion against the plaintiff, whereupon the counsel for the plaintiff moved to amend the writ and declaration by an insertion of the words "surviving partners of J. S. deceased." The Court however refused the application, and made the rule absolute.—Rule absolute. See *Bing*. 68. 206; 6 *T. R.* 363.*

their individual capacity, the variance was holden fatal, and the Court would not permit amendment on payment of costs.

6. R. M. 1736. K. B. Reg. 2. b.

On amending the declaration after plea pleaded, the defendant shall be a liberty to plead *de novo*, and have two days for that purpose, after amendment made, and payment of costs. See *R. T.* 5 & 6 *Geo.* 2. c. 61.

7. ANONYMOUS. M. T. 1702. K. B. 2 Salk. 520. S. P. WITHERS V. BAKER.

T. 1700. K. B. 11 Mod. 198. ANONYMOUS. T. T. 1798. K. B. 2 Salk.

517. S. P. BARTON V. MOORE. M. T. 1798. K. B. 8. T. R. 87.

It is the settled practice of the Court, if the plaintiff moves to amend his declaration in the same term, the defendant's plea is filed or delivered, the plaintiff need not given a new rule to plead, but the defendant must plead in a convenient time.

8. BARPEY V. LORD RODNEY. M. T. 1822. K. B. 2 Chit. Rep. 322.

A rule had been obtained to set aside the judgment in this case. It appeared that the plaintiff had delivered a declaration; that the defendant had pleaded thereto; that the plaintiff had in a subsequent term amended his declaration, with liberty to the defendant to plead *de novo*, but that no fresh rule to plead had been given. *Per Cur.* Where the declaration is amended in the same term in which the rule to plead is given, a fresh rule is unnecessary; but where the declaration is amended in a subsequent term, it must invariably be given.—Rule absolute. See *Salk.* 517-18; 8 *T. R.* 78.

9. BLUNT V. MOTTIS. T. T. 1771. C. P. Blac. 2. 785. S. P. BARTON V.

MOORE. M. T. 1798. K. B. 8 T. R. 87.

The declaration was delivered on the 3d of June, with notice to plead in four days: on the 7th of June the defendant demurred; on the 11th of June the plaintiff took out a summons for leave to amend his declaration; on the 12th of June, a judge's order was obtained for that purpose, on payment of

rule that before the declaration is actually entered, the plaintiff may amend it, paying costs or giving an imparlance at his own election, by order of a judge of the court, or prothonotary, and even after it is entered; if the amendment be but a small matter, that doth not deface the roll, it is amendable before issue or demurrer entered by a rule of court upon payment of costs, and liberty to plead *de novo*. R. M. 1664. s. 17. C. P.

* As to the principal point decided in 6 *T. R.* 363. see 1 *B. A.* 29. where it was held that under a declaration containing only one set of counts charging the defendant in his own right, the plaintiff might recover one demand from the defendant individually, and another due from him as a surviving partner. But where a party sues as a surviving partner, he must be described as such in the declaration. 4 *B. & A.* 474.

costs, which were paid; and the same evening the plaintiff demanded a plea in all cases the next day, or judgment; on the 13th of June judgment was signed by de- to a new fault; the same day the defendant moved to pay money into court, and took four days out a summons for a week's time to plead; on the 24th of June he paid money rule to into court, and pleaded the general issue; the prothonotaries and secondaries plead, but an reported, that upon amending the declaration, a new four days rule to plead amendment of the plain was necessary. Judgment set aside with costs, on defendant consenting to tiff's decla take short notice of trial. See 1 Lill. Prac. Reg. 475; 1 Tidd. 482-8; 6th ed. ration does not necessa

10. WOODROFFE v. WATSON, M. T. 1815, C. P. 6 Taunt. 400.

The plaintiff had obtained leave to amend on payment of costs, without any stipulation being expressed as to the defendant's pleading *de novo*. A rule nisi was obtained to set aside a verdict which had been entered for the plain- to plead de tiffs, in consequence of the non-appearance of the defendant, who relying on tiffs, in consequence of the non-appearance of the defendant, who relying on his right to plead *de novo*, had not appeared. *Per Cur.* The liberty to plead *de novo* is not a matter of course consequent on every amendment. It is to the ac only a matter of right where the nature of the defence is changed. But as tion must the plaintiff never re-delivered the issue after making the amendment, the rule be altered. must be made absolute.—Rule absolute.

11. WILLIAMS v. PRATT, T. T. 1822, K. B. 5 B. & A. 896.

The plaintiff had been nonsuited at *nisi prius* on the ground of a variance between the contract set out in the declaration, and that proved in evidence. Motion was made to set aside the nonsuit; and the Court granted a rule nisi for a new trial, with leave to amend the declaration on payment of costs. On the rule being opposed. *Per Cur.* The plaintiff may amend his declaration generally, and is not confined to the particular error in question, after which the defendant has it in his power either to plead *de novo*, or demur to the de- claration, as he may be advised.—Rule absolute. See 4 M. & S. 470; 2 Chit. Rep. 28; ante, 538.

ment of the declaration generally was allowed, and a new trial granted upon payment of costs, with liberty to defendant to plead *de novo* or demur.

12. HALHEAD v. ABRAHAMS, T. T. 1810, C. P. 3 Taunt. 81.

In an action on a replevin bond which was undefended, a nonsuit had been entered in consequence of a fatal variance: three dozen of chairs being mentioned in the bond, and four in the declaration. Bayley, J. at *nisi prius*, and granted said, that if he had been a judge of the court where the action was brought, a new trial. he would have amended the declaration *pro tanto* at the time of the trial. A motion was made to amend and set aside the nonsuit. *Per Cur.* Let the rule be made absolute upon payment of costs† occasioned by the amendment, viz the same costs as if it had been amended before the trial of the cause by summons to attend before a judge in London. Rule absolute.

(F) OF THE PARTICULARS OF DEMAND.

If the particulars delivered under a judge's order be not sufficiently explicit, the party to whom they are delivered may take out a summons and obtain an order for further particulars; and if, on the other hand, they are incorrect, or not sufficiently comprehensive, the party delivering them may have a summons and order to amend. Vide post, tit. Particulars of Demand; and see 1 Campb. 69. n.; 2 Taunt. 224; 4 Taunt. 189; 1 Stark. 224. [545]

(G) OF THE PLEA ‡

(a) In abatement.—Vide ante, p. 61.

(b) In bar.

* By 1 Geo. 4. c. 55. § 5, 6. a judge on the circuit may now order an amendment, whether he be the judge of the court in which the record was made up, or not.

† As a general rule it may be stated that when amendments are made at the trial, it is without payment of costs; in other cases we have seen that it is usually imposed. See 2 Burr. 756; 1 Salk. 47. 517; 3 id. 31; 1 Wils. 7, 76, 225.

‡ Whilst pleas are in paper they are amendable at common law by leave of the Court, upon payment of costs; and they may be amended at any time as to defects, which in the opinion of the Court have originated in the misprision of the clerks. 8 H. 6. c. 12. The following defects are also aided after verdict by the statute of jeofails, and after judgment by confession or default, by 4 & 5 A. c. 16. § 2. Mispleading, lack of colour, insufficient

The defend 1. JORDAN v. TIWELLS, M. T. 1722, K. B. Ca. Temp. Hard. 171. S. P.
ant will not
be permit
ted to a
mend his
plea after
the plaintiff
has lost a
trial.

BLUDWICK v. OSBORNE, T. T. 1741, C. P. Barnes, 19.

[546]

In an action of debt on an indenture of lease, the defendant pleaded, that after making the lease, and before any rent became due and payable, one K. B. having a prior and better right and title to the premises by due process and course of law, expelled and evicted the defendant. Demurrer assigning for cause that the defendant in his plea had not set forth what right or title the said K. B. had to the premises. Joinder in demurrer; but soon after the cause was set down for argument, the counsel for the defendant moved to amend the plea. The motion was opposed, and it was insisted that the application was now too late, the plaintiff having been delayed of his trial during the last assizes, and the cause being now in the paper. *Sed per Cur.* The great objection to this motion is that the plaintiff has lost his trial; and if this application be granted, it will be a certain method of obtaining delay. Amendments have sometimes been allowed even after the cause has been carried down to trial, but all amendments permitted after the cause is so far advanced have been on the motion of the plaintiff. The proposed amendment must be refused.

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murrer,

2. HATTON v. WALKER, M. T. 1729, K. B. 2 Stra. 846. S. P. CARPENTERY. DAVIS, H. T. 1738, K. B. And. 305. MURRY v. BOWEN, E. T. 1750, C. P. Barnes, 21. LACY v. BARRY, E. T. 1750, C. P. Barnes, 20.

Or after ex-
ecution and
a writ of in-
quiry, on
payment of
costs, the
Court order-
ed a plea to
be amend-
ed and the
damages
found by
the inquisi-
tion to be
brought in
to court;
Or adding a
new debt
to a plea of
*plene admi-
nistravit*.

The defendant concluded his plea with "wherefore he prays judgment," instead of "if the plaintiff ought not to maintain his action." After demurrer and joinder, an application was made for leave to amend by the draft, under the counsel's hand, which was objected to, on the ground that the intent of requiring mistakes in point of form to be shown for cause of demurrer, was to give the party an opportunity to amend before he proceeded any further; but if after notice of his fault he would proceed to join in demurrer, he was not entitled to the favour of amending, and the Court were strongly inclined against granting the permission; but after argument, they conceded it. See 2 Tidd. 742. 6th ed.

3 BROADBENT v. WILKES, E. T. 1740, C. P. Barnes, 15.

Defendant mistook a fact, and set out a custom incorrectly; he applied to a judge for leave to amend, but plaintiff not consenting, the judge made no order. Plaintiff signed judgment; and before inquiry executed, defendant gave notice of motion. Defence was made on the inquiry. *Per Cur.* Let the judgment and inquiry be set aside; and let the plea be amended on payment of costs, on defendant's bringing the 15*l.* damages found by the inquiry into court.

4. TYRRELL v. MEEN, H. T. 1756, C. P. Barnes, 25.

And where
the defend-
ant in tres-
pass plead-
ed 2 pleas
in Hilary
term, and
in Trinity
term after
issue joined
a rule to
show cause
why he
should not
have leave
to amend
and to add
a third plea
the rule
was made
absolute up
on payment

On a rule to show cause why defendant's special plea of *plene administravit* should not be amended by adding a debt due from the intestate, the Court made the rule absolute upon payment of costs.

5. WATERS v. BOWELL, T. T. 1748, K. B. 1 Wils. 223.

Trespass: the defendant pleaded two pleas in Hilary term, and in Trinity term after issue joined, obtained a rule to show cause why he should not have time to amend and add a third plea. Upon showing cause it was objected that the third plea could not be added, because it was now two terms since the defendant had pleaded, and it was compared to the practice of the Court not to give a plaintiff leave to add a count after two terms. *Sed per Cur.* The rule must be absolute upon paying costs; for there is no time limited for applications to the Court to plead several pleas; the reason why pleading, or default or negligence of the parties, their counsellors, or attorneys; 32 H. 8. c. 30; lack of averment of any life so as the person be proved to be alive; 21 Jac. 1. c. 13; want of profert, or mistaking the christian name or surname of either party, sums, day, month, or year, in any pleading, being right in any writ, plaint-roll, or record preceding, or in the same roll or record wherein the same is committed, to which the other party might have demurred and have shown the same for cause; want of the averment of *hoc paratus est verificare*, or of *hoc paratus verificare per recordum*; or for not alleging *prout patet per recordum*, or any other matters of the like nature, not being against the right of the matter of the suit, nor whereby the issue or trial are altered. 16 & 17 C. 8.

a plaintiff is not allowed to apply for leave to add a count, within two terms [547] is, because he is obliged to declare within two terms, otherwise he would be of costs. out of court, and a new count is considered as a new declaration; but the If a plea of plaintiff's being refused after two terms to add a count, is not under such dif- a former judgment ficulty as the defendant would be if he were refused to add a plea after two recovered a terms, for the former may have a new action. against an executor

6. STRUTT v. WOODWARD, EXECUTRIX, E. T. 1789. K. B. 1 H. B. 238.

In an action for money had and received by the defendant's testator, the states a less defendant pleaded that C. S. in E. T. had recovered judgment against her sum than as executrix for 6*l.* and *plene administravit propter* 50*s.* which were not suffi- the judg- cient to satisfy the outstanding judgment. After judgment of assets *quando* ment was, the Court *acciderent*, a rule was obtained to show cause why the defendant should not will permit have leave to amend the record by inserting in her plea, 20*l.* instead of 6*l.* the record to be amended. Affidavits of C. S. having been filed, and of the defendant her present attor- ded. ney, stating, that the former judgment was in fact for 19*l.* 15*s.* and 6*l.* costs; A double that by mere mistake of the defendants former attorney, the amount of the plea, to a damages recovered was omitted in the plea. *Per Cur.* We doubt the pro- penal ac priety of the amendment; but as the justice of the case is in favour of the tion not a defendant, she may amend the plea, and the plaintiff may reply *per fraudem*, if mendable. he thinks proper. And after a new trial has been granted, the Court will not allow an amend ment by striking out some of the pleas; But the pleas in an action were amended, and a new trial granted on pay ment of costs.

7. ANON. H. T. 1850. C. P. Barnes. 15.

Per Cur. In an action on a penal statute, defendant cannot plead double; this case is not within the statute for the amendment of the law.

8. PARKER v. ANSELL, T. T. 1773. C. P. 2 Blac. 920.

A new trial was obtained in a cause wherein a general verdict had been found for the defendant, though he had given no evidence on two or three pleas, upon which issues had been taken, and though the plaintiff had given evidence to disprove them. The defendant then applied to the Court for leave to amend by striking out those pleas; but *Per Cur.* We are of opinion that the motion is not only unprecedented, but ill founded; the intent of new trials is to submit the same question to the consideration of another jury, but this would be to vary the questions, and perhaps in the very point on which the plaintiff chiefly relies.—Motion refused.

9. STORER v. GORDON. E. T. 1815. 2 Chit. Rep. 27.

A rule nisi had been obtained to amend the pleas in this action after a verdict had been found for the plaintiffs. *Per Cur.* These amendments are always permitted to further the justice of the case. The rule may be made absolute upon payment of costs; but it must certainly be accompanied with a new trial.—Rule absolute. See 1 Burr. 316. 321; 7 T. R. 132. 699. [548]

10. STAPLE v. HEYDEN. M. T. 1702. K. B. 6 Mod. 2.

Per Cur. Upon the amendment of a plea in paper there must be costs. Vide 1 Hullock. 340. 2d edit.

(e) *Puis darrien continuance.*

1. WILLOUGHBY v. WILKINS. E. T. 1805. K. B. 2 Smith. 396:

The declaration in this case was on an award for the payment of money; it was delivered on the 4th of May. The defendant pleaded payment as to one breach, and another plea as to the residue. On the 15th of June a *dis-tringas juratorum* issued, and every step was taken necessary for going to trial; and, late in the evening of Saturday before the trial, which would be on Monday, notice was given of a plea filed *puis darrien continuance*, viz. that the defendant obtained his certificate, which, in point of fact, was obtained on the 13th of May. The affidavit of the truth of the plea was sworn on the 14th day of June and not earlier. The venire was returnable in eight days of the Holy Trinity, and a motion was made to set aside the plea for irregularity, or to show cause why it should not be pleaded as of the day it was actually put in and filed, on the ground that there was no such last continuance as the plea referred to, but that a previous continuance had elapsed, viz. the morrow of the Holy Trinity, on the 27th day of May, between the time of the certificate being obtained and the plea being filed; and that it was consequently irregular; that in point of fact a continuance had plead it

On amend ing a plea costs are payable. Where the defendant pleaded his certificate of bankrupt cy *puis da rier contin uance* but in fact two continuan ces had elapsed and the plaintiff had gone to trial with out notic ing the plea he was al lowed to a mend and plead it

nunc pro tunc upon payment of costs between the last continuance & the time of filing the plea.

After issue notice of trial, and putting off the trial until a subsequent term, the Court allowed an amendment of a plea of bankruptcy *pais d'arriens* en continuance, without permitting the terms, that the plaintiff might discontinue without costs, but requiring that the defendant should take short notice of trial.

[549] A replication to a plea of *ple ne administravit*, is not amendable after a verdict thereon has been set aside. A replication to a plea of the statute of limitations may be amended after demurrer by adding continuances. The plaintiff may amend by withdrawing his replication & replying *de novo*.

happened on the third day of June, so that the allegation of the last continuance in the plea was false; and if it was stated according to the truth, when the plea was filed, there would appear a contradiction in terms upon the face of the record. *Per Cur.* The case of *Lovell v. Eastaff*, 3 T. R. 554. goes a great way to show that the whole of what has been done by the defendant is regular. Unless the defendant has the means of pleading his certificate in this way, he is remediless, although it is a just and fair plea which is given him by statute; and if the application were to plead it *nunc pro tunc*. we should certainly allow it. The question is reduced merely to a question of costs; therefore let this plea stand as if it had been filed, in due time, and let the plaintiff have the costs between that time, and the time when it was filed, that is, between the 3d day of June and the 16th of the same month.—Rule discharged. See Com. Dig. tit. Pleader B.; 2 Wils. 358; 5 G. 2. c. 30; Bac Ab. Pleas. 2 Yelv. 184; Freem. 252. Bul. N. P. 209.

2. *LINDO v. SIMPSON*. T. T. 1805. K. B. 2 Smith 659.

In this action issue was joined in Hilary term, and notice of trial was given for the sittings after that term. The trial was put off until Easter term, on account of the absence of a material witness in the West Indies. In the affidavit for this purpose there was no intimation that the defendant was delaying the trial in order to obtain his certificate. The commission against the defendant issued on the 4th of December; the certificate was signed in February, 1805, and allowed on the 28th day of February, 1805. The Court afterwards admitted the defendant to plead this *pais d'arriens* continuance. A rule was now obtained to show cause why the defendant should not amend his pleadings by stating the particulars of his bankruptcy in his second plea. *Per Cur.* The defendant does not want to plead bankruptcy anew, but to plead it correctly. The counsel for the plaintiff then requested that the plaintiff should have liberty to discontinue his action without costs. *Per Cur.* As to discontinuing without costs, there is not enough to show that you are entitled to that indulgence at present. You should come with that motion hereafter. The terms of the present rule are, that if the plaintiff should choose to go to trial, the notice of trial should be continued the same as before, and the defendant should take short notice of trial.—Rule absolute. See 2 Wils.

139. 6 East. 413. Co. B. Laws, 536.

(H) OF THE REPLICATION.

1. *THE BANK OF ENGLAND v. EORRICE*. M. T. 1734. K. B. 2 Stra. 1002.

To a plea of several specialties outstanding in an action on a simple contract against an executor, the plaintiffs replied *assets ultra*, which was found for them, but the verdict was afterwards set aside. A motion was made for leave to alter the replication, and reply fraud; and 3 Lev. 361. was cited; but the Court said, there must have been some consent given in that case, else it would be an authority for withdrawing all vicious pleadings at any time; and here it might be dangerous, because the defendant on the former issue might have paid away assets, knowing that the replication could not be a bar. The amendment was denied.

2. *CROKATT v. JONES*. M. T. 1743. K. B. 2 Stra. 734; S. C. not S. P. 2 Ld.

Rayn. 1441. S. P. *COOPER v. YOUNGER*, H. T. 1732; C. P. Barnes. 3.

In an action on a bill of exchange the defendant pleaded that the bill was first exhibited 23 Oct. 12 Geo. 1. and that he had not promised within six years before the exhibiting of the plaintiff's bill; to which the plaintiff replied, that the action first commenced 28th November, 31 Geo. 1. and that the defendant promised within six years before that time; to which the defendant demurred. Plaintiff moved to amend the replication by setting out the writ, and adding the continuances. The amendment was opposed on the authority *Halles v. Hall*, C. P. E. T. 11 Geo. 1. *Sed per Cur.* The authorities of our own court warrant it. Let the replication be amended on payment of costs. See Salk. 320; Lutw. 255; 1 Stra. 583; Tho. Ent. 438.

3. *ALDER v. CHIP*. H. T. 1759. K. B. 2 Burr. 756.

This was on motion to show cause why the plaintiff should not be at liberty

to withdraw his replication and reply *de novo*. The application was opposed [550] on the ground that six terms had elapsed; but it was answered that in many a lapse of cases amendments had been made after a much longer time.—Rule absolute. several terms;

4. *TOURVILLE v. PENNY*, M. T. 1754, C. P. Say. 172.

It was moved in Michaelmas term, after issue joined, for leave to withdraw a replication, which was of Easter term preceding, and to reply anew. It was granted, and *Per Cur.* There is a wide difference between this and adding a new count after two terms. Adding a new count is for a new cause of action; but a new replication is in the nature of an amendment, respecting which there is no time limited. Or after is sue joined: Or the cause entered at the assizes and made a remanet for defect of jurors.

5. *CÔPE v. MARSHALL*, E. T. 1755, C. P. Say. 285. *S. P. PALMER v. RICHARD*, H. T. 1661, K. B. T. Raym. 64.

Issue was joined upon the replication, and the cause entered at the assizes, and made a *remanet* for defect of jurors. Leave was afterwards given to amend the replication. But where the plaintiff had been nonsuited upon a general replication that the cause of action arose within six years, the Court refused to set aside the nonsuit and to give the plaintiff leave to reply *de novo* that the writ of *latitat* issued within six years.

6. *HUTCHINSON v. BRICE*, H. T. 1771, K. B. 5 Burr. 2692.

The Court refused to set aside a nonsuit voluntarily suffered by the plaintiff, and to give him leave to reply *de novo*; when he had replied "that the cause of action arose within six years;" which he had been unable to prove. Had he succeeded in the application, he would have replied "that the writ of *latitat* issued within the six years." But the Court said that that would make an entire new question, which the plaintiff had before pretermitted, and had put the issue upon quite another footing. Vide *Robinson v. Raley*, 1 Burr. 321 to 322; and also *Alder v. Chip*. 2 id. p. 736. the Court refused to set aside the nonsuit and to give the plaintiff leave to reply *de novo* that the writ of *latitat* issued within six years.

7. *COOKE v. BURKE*, T. T. 1813, C. P. 5 Taunt. 164.

In an action of debt upon a judgment the defendant pleaded, 1. *Nil tiel record*; 2. Payment and satisfaction; 3. *Nil debet*. The plaintiff in his replication, *inter alia*, took no notice of the second plea. The defendant added a *similiter* after the second plea, without previously traversing the satisfaction. After a verdict for the plaintiff upon the plea of satisfaction, a rule nisi had been obtained in arrest of judgment; a counter rule had also been obtained by the plaintiff to amend. *Per Cur.* Although a replication to the second plea has been erroneously omitted by the plaintiff, yet the substance of the plea, viz. the question of payment, must have been tried on the issue of *nil debet*. The amendment is therefore reasonable and proper. Let the rule to amend be made absolute upon payment of costs, and the rule in arrest of judgment discharged upon payment of costs. See 1 N. R. 28; 2 Saund. 319, n; Cowp. 407. A traverse of a plea after verdict for the plaintiff was allowed to be inserted in his replication upon payment of costs. But a replication to a sham plea has been permitted to be amended without payment of costs.

8. *SOLOMONS v. LYON*, E. T. 1801, K. B. 1 East, 369.

In this case there was a special demurrer, assigning for cause that the plaintiff had concluded his replication to the country, although the plea to which such replication was made was founded upon matter of record, and could only be tried by the production or non-production of the record therein mentioned, &c. The Court proposed to the plaintiff to amend, as the mistake which he had committed prevented the merits of the case being entered into. The plaintiff then prayed to amend without payment of costs, suggesting that this was a sham plea filed by the defendant. The defendant admitting this suggestion to be correct, the Court gave the plaintiff a rule absolute to amend without payment of costs. See Salk. 515.

(I) OF NOTICE OF SET-OFF.

1. *CARPENTER, EXECUTOR, v. JOYNES*, T. T. 1731, C. P. Prac. Reg. 21. S. P. ANON, H. T. 1733, C. P. Barnes, 294.*

The defendant had given notice that at the trial he would give a promissory note in evidence against the plaintiff's demand; but finding his notice deficient, moved for leave to amend the notice, but the motion was refused. Notice of set-off is not amendable;

* But this amendment may in effect be accomplished, although the above case should be recognized as law, by withdrawing the plea of the general issue, and pleading it again with a new notice of set-off. 1 T. R. 698.

2. EDDINGTON v. WILCOX, 1738, K. B. And. 208.

Unless it be by consent. On a motion to amend a notice of a set-off, it was urged that, by virtue of the statute, such notices were to be considered as a special plea, and leave was granted by consent to insert the words coal mines instead of lead mines.

(J) OF A DEMURRER.

A demurrer cannot be amended without the consent of the opposite party. MAYNARD v. HOPKINS, T. T. 1752, K. B. Say. 46. S. P. TURNER v. CORDWELL, M. T. 1734, cited id.

A demurrer to a plea in abatement concluded by praying judgment of the action, upon motion to amend it, by praying judgment of *respondeas ouster*, the amendment was consented to upon payment of costs, but it was by the express orders of the Court inserted in the rule, that the amendment was consented to.

(K) OF WRIT OF INQUIRY.

1. ANON. T. T. 1685, K. B. 3 Mod. 112.

Judgment was given upon a demurrer, and a writ of enquiry was awarded; in the entry thereof upon the roll the words *per sacramentum duodecim proborum et legalium hominum*, were left out. The question was, whether it could be amended. *Per Cur.* The error is only a misentry of the writ of inquiry, and is amendable. See Cro. Car. 184; 1 Comyn. 418; 2 Saund. 289; 1 T. R. 783; 8 Mod. 244; 1 Sid. 70; 1 Roll. Ab. 205; Cro. Eliz. 609; And. 362; 10 Mod. 68; 8 Mod. 392; 2 Ld. Raym. 1397.

2. HAMMOND v. PURSELL, M. T. 1688. K. B. Carth. 70.

A writ of inquiry was returnable *die veneris prox^o post crastino ascensionis Domini*, which was a day out of term; but it was executed within term, and damages assessed for the plaintiff. Upon a writ of error brought in the Exchequer Chamber, assigning the above defect, a motion was made for leave to amend the return. *Per Cur.* If the award of the writ of inquiry on the roll is good, the writ itself may be amended by the roll; so if the writ be good, and the record ill, it may be amended by the writ. Notwithstanding both were defective, in this case the amendment was ordered.

3. HUGHES v. ALVAREZ, H. T. 1725, K. B. 1 Stra. 684.

In an action upon two promises, the plaintiff obtained judgment of the first; and as to the second, a *nolle prosequi* was entered, writ of inquiry having issued to ascertain what damages the plaintiff had sustained by reason of the promises. On the writ being returned, it was moved that it should be amended, and made "by reason of the non-performance of the said first promise," and on the authority of Baker v. Campbell, E. T. 4 Ann. B. R. the writ was amended, the judgment by default being a warrant to amend by.

So where the writ of inquiry was against two defendants and the declaration against three the Court allowed the amendment on payment of costs; Or by substituting the words "by reason of not performing the undertakings above men-

4. CONDEN v. COULTON, M. T. 1736, K. B. Ca. Temp. Hard. 314. S. P. REDWAY v. POOLE, H. T. 1738, And. 362.

In trespass; the declaration was against three defendants, and the writ of inquiry recited it to be against two only; and on motion to set it aside for irregularity, leave to amend was prayed and granted, on payment of costs.

5. HAMMOND v. GATLIFFE, H. T. 1737, K. B. And. 77.

In an action for goods sold, the declaration contained a *quantum meruit* and an *indebitatus assumpsit*. Defendant pleaded a tender; and the plaintiff demurred as to part, and as to the other part, entered a *nolle prosequi*. Upon the demurrer, judgment was given for the plaintiff, and a writ of inquiry was awarded, that "because our Court doth not know what damages" the plaintiff hath sustained by the occasion aforesaid, &c.; and after the writ had been executed, it was moved that the writ of inquiry might be amended by the judgment roll, by striking out the words "by the occasion aforesaid," and substituting instead "by reason of not performing the undertakings above mentioned."—Rule absolute for the amendment, on payment of costs.

6. INGHAM v. CHISULL AND NOKE, E. T. 1743, C. P. Barnes, 15.

To a joint action on several promises, Chishull pleaded bankruptcy; Noke

pleaded a former recovery for the same demand. After judgment against Noke on *nisi* record plaintiff confessed Chishull's plea to be true, and entered a *nolle prosequi* as to him, pursuant to the statute 7 Ann. The plaintiff sued out a writ of inquiry in the same manner as if the interlocutory judgment had been against both defendants; but by the inquisition, damages were found out the against Noke only. The defendant Noke moved to set aside the writ of inquiry and inquisition, and obtained a rule to show cause, pending which plaintiff moved to amend the writ by striking out Chishull's name after the *taliter processum fuit*; and the rule for the amendment was made absolute without opposition.

7. JOHNSON v. TOMLINSON, T. T. 1803, K. B. 4 East, 173.

A rule *nisi* was obtained to amend the teste of a writ of inquiry. Notice of executing the writ had been given for the 21st of April, but the execution of it had been referred in consequence of an intended reference, upon which a fresh notice had been given. The writ, which had been correctly tested the 12th of February, remained in the Secondary's Office until it was executed, prior to which the return had been altered and the writ sealed; but an alteration of the teste being omitted, it was now moved to teste the writ the last day of Easter term. *Per Cur.* The amendment is according to the truth, as there is also something to amend by, viz. the award of the writ of inquiry upon the roll, the date of which is right, the rule must be made absolute.—Rule absolute. See 2 Lord Raym. 1061; 2 Bl. 836; Cro. Eliz. 760; Carth. 70; Rep. Temp. Hard, 314.

8. KIRBY v. ELLISON, M. T. 1731, C. P. Prac. Reg. 24.

On motion for leave to amend the award of a writ of inquiry on the roll, it appeared that this was a proceeding by bill, and on the roll the writ of inquiry was awarded returnable *a die Paschæ in quindecim dies*, whereas it should have been *die Mercurii prox post*, &c. on a day certain. After hearing counsel, the Court made a rule for the amendment.

9. BEAN v. ELTON, T. T. 1736, K. B. 2 Stra. 1077; S. C. And. 12.

A writ of inquiry was executed in 1728, and costs taxed, but no final judgment entered up. It subsequently became necessary to prove the debt in Chancery, but the writ of inquiry could not be found, and a rule was made for a new writ and inquisition, according to the Sheriff's notes, and that the master should endorse the costs, which appeared by the commitment book to have been taxed.

(I.) OF THE ISSUE.*

1. GREENWOOD v. PIGGON, M. T. 1694, K. B. Skin. 591.

A clerk, in joining issue, had inserted the name of John instead of Thomas, and the same mistake was continued in the plea roll and *nisi prius* roll. Motion for leave to amend.

Per Holt, C. J. It is a misprision of the clerk, apparent from the nature of the thing, and ought to be amended.

2. WHITE v. THE BISHOP OF WORCESTER, M. T. 1695, K. B. 12 Mod. 107; S. C. 1 Salk. 48; 1 Ld. Raym. 94, 511.

In ejectment against seven defendants, who had entered into the common rule for confessing lease, entry, ouster, and pleading to issue. The plea roll, the *venire*, *distringas*, and the *jurata*, were respectively correct, but the issue in the *nisi prius* roll was between the plaintiff and five defendants, only, which was tried, and a verdict given for the plaintiff: and an amendment being moved for, it was opposed, because intended to alter the verdict, to subject the jury to an attain, to make another issue, and to make two defendants guilty who were not tried. *Per Cur.* Nothing but the title of the lessor can be inquired into, and the issue depends on his title, which is not altered by this amendment. And it must be considered that all the seven entered into the common rule, and that the plea roll, &c. are all right, and this cannot be in-

* The misjoining of issue, or an issue in other respects informal, or a miscontinuance, or a discontinuance, is aided by 2 H. 8. c. 30. See 32 Saund. 319; 2 id. 1, e. post, tit. Issue.

tioned," for "by reason afore said:" Or by striking out the name of one of several defendants. [553]

The award of the writ on the roll is also amendable. A new writ of inquiry may be obtained if the original be lost. A misprision of a clerk in the issue, *nisi prius* roll and plea roll, is amendable. Ejectment against 7, who all appear, plead and join is sue: the plea roll, *jurata*, and *distringas* was against the seven: but the issue was on the *nisi prius* roll was joined by 5 only. Held that the latter roll may be amended by adding the other two

tended other than the same issue; and the amendment is only to rectify a plaint mistake, and make the issue what was apparently intended.—Amendment granted. See *Stra.* 843; *Cro. Car.* 338; 1 *Burr.* 843; *Yelv.* 64; *Comb.* 391; 1 *Wils.* 30; *Poph.* 102; 2 *Mod.* 316.

3. *COWPER v. SPENCER*, T. T. 1724, K. B. 8 *Mod.* 376; S. C. 1 *Stra.* 641. *S. P. COKE v. HEATHCOT*, M. T. 1700, C. P. 12 *Mod.* 598.

An informal issue is amendable, but not on an immaterial issue.

After a verdict for the plaintiff a motion was made in arrest of judgment that no issue was joined in the cause, it being, and "therefore he prays that it may be inquired of by the country," but the *similiter* was omitted. On the other side it was urged that the averment was unnecessary, because the appearance of the defendant was recorded on the *postea*, and that at all events it was only an informal issue, and amendable.

Per Cur. In every issue joined there must be a verdict on one side or the other, otherwise there could be no judgment, and the plaintiff would now have judgment for damages on a verdict found on an informal issue, as it is alleged to be, but on no issue joined, as the defendant says; now there is a difference between an immaterial and an informal issue, and where there is no issue at all joined, and where the issues are informally joined; as where it is said in the entry, "and the aforesaid defendant likewise," where it should be "the aforesaid plaintiff likewise," in which case the issue is tendered by the defendant, but in the principal case the issue was tendered by the plaintiff, and never joined by the defendant; hence there was no issue at all. *Vide post*, tit. *Issue*, *Bul. N. P.* 321; 2 *Saund.* 319, b; 2 *Saund.* 579.

4. *SAYER v. POCKOCK*, H. T. 1776, K. B. *Cowp.* 407.

But a *similiter* may be added at the end of the replication of, &c. [555]

On a rule to show cause why the record should not be amended after verdict, by adding at the end of the replication the words, "and the defendant does so likewise," instead of, &c. it appeared that a motion had been made for a rule to show cause why the judgment should not be arrested, upon the ground of there being in point of fact no issue joined, in consequence of the above defect. *Per Cur.* We are grieved that such objections are made; they have nothing to do with the justice of the case, but only serve to entangle, without being of the least aid in preventing irregularities. Without considering, therefore, whether it is within the statutes of jeofails or not, it is best to amend, in order to avoid a writ of error. There are three grounds which satisfy us that the matter in this case is amendable; 1st. That it is an omission of the clerk. 2dly. That we ought to adopt the reasoning of Lord Coke, and construe the &c. to mean every necessary matter which ought to be expressed. 3dly. By amending, the Court only makes that correct which the defendant himself understood to be so by his going down to trial.—Rule to amend was made absolute.

5. *EASON v. WILKINS*, T. T. 1743, C. P. *Cn. Prac.* 106.

The non joinder in issue to one of several pleas is amendable.

A motion was made to arrest the judgment in an action of assault and battery; there had been two several pleas of non-assault, and issue was joined on the last, but left out on the first. The Court granted a rule to show cause, which was afterwards discharged, because it appeared to be the clerk's mistake, and amendable by the statute of jeofail; and that as issue was joined on the latter plea, that might also have reference to the first.

6. *THORNLEY v. HUGHES*, H. T. 1755, C. P. *Barnes*, 25.

But if issue be joined on one of several pleas, the other can not be amended, although be *foro argui* ment on demurrer.

A defendant, by leave of the Court pleaded two pleas; 1st. Not guilty; 2d. A special justification. On the former plea, issue was joined; to the latter plea, plaintiff replied specially. Defendant demurred to the replication, and plaintiff joined in demurrer. Plaintiff made up the issue, (awarding contingent damages as usual,) and before argument of the demurrer proceeded to trial, and obtained a verdict; defendant then moved for and obtained a rule to show cause why he should not amend the latter plea on payment of costs.

The Court thought that the application for the amendment came too late, especially as it appeared that, before the trial, the defendant had applied for leave to make the proposed amendment, and then had a rule to show cause, which rule defendant's agent had waived by a note in writing, signed by him, directed to plaintiff's agent.—The last rule to show cause discharged.

7. **BEAUMANT V. STUART.** H. T. 174J. C. P. Barnes. 18.

The Court made a rule absolute, giving plaintiff leave to deliver a new issue properly entitled, in the title of the issue already delivered, the word "George," being omitted; it stood thus, Hilary term, 20th King the Second.

8. **WRIGHT, qui tam, v. HORTON.** H. T. 1817. K. B. 2 Chit. Rep. 25; S. C. 1 Stark. 400; Holt, N. P. c. 458.

A rule nisi had been obtained to amend the record in the penal action after verdict for the plaintiff, by adding a *similiter*. It appeared that the objection had been taken at nisi prius.

Per Cur. The omission of the *similiter* is a clerical error. Let the rule be made absolute.—Rule absolute. See Cro. Jac. 502; 3 Burr. 1793; id. 2084-5; Cowp. 407; 2 Stra. 1227; 1 Wils. 125; 6 T. R. 255; 4 Taunt. 16; 2 Saund. 319, n; 6 Tidd. 7th edit. 707; 3 B. & P. 1.

* (M) OF JURY PROCESS.*

(a) Of the *venire facias*.†1. **FOWKE V. HORABIN.** T. T. 1759. C. P. Barnes, 11.

It being objected in arrest of judgment that the *venire facias*, instead of being made returnable in court, was made returnable before the Chief Justice; the Court held that the return, though defective, was within the statute of amendments.

2. **SHEERS V BARTLETT.** T. T. 1738. C. P. Barnes, 484.

London was in the margin, but in the body of the declaration the venue was laid at Tame, in Oxfordshire, and tried there, and plaintiff obtained a verdict. Defendant moved in arrest of judgment, that the *venire facias* being awarded to the Sheriffs of London, the Court must take judicial notice that there is but one sheriff of Oxfordshire. *Per Cur.* Had there been no proper venue in the body of the declaration, the margin must have been resorted to; but in this case the margin may be rejected. The word "sheriffs" for "sheriff" is amendable; and here the *venire facias* is returned by the Sheriff of Oxfordshire.

See 12 East, 229; Cartwright v. Gardiner, Barnes, 7.

3. **PHILIPS V. SMITH.** M. T. 1718. 1 Stra. 136; S. C. 1 Com. Rep. 279.

The award of *venire* was *quindecim Martini*, and the teste the first day of Hilary term. It was moved to amend the teste by making it in Michaelmas term, which was allowed, notwithstanding the case of the Queen v. Tuchin, 1 Salk. 37. which was cited *contra*.

4. **WILKINSON V. MEYER.** E. T. 1723. K. B. 8 Mod. 232.

In an action of covenant, judgment had been pronounced for the plaintiff, a writ of error was brought in the Exchequer Chamber by the defendant, and in Trinity term following it was moved to amend the *venire facias*; for this being an action of covenant, and the defendant having pleaded several pleas, and the plaintiff having replied to one and demurred to the rest, the *venire facias* was drawn in the usual form, viz. as well to try the issue as to inquire of the damages; these last words, viz. "to inquire of the damages," ought to be struck out; to which it was answered, that if the Court should give leave to amend this record, after a writ of error brought, it is but reasonable that the plaintiff, in the original action, should pay costs. The counsel for the defendant in error offered to pay costs, so as the plaintiff would waive his

The title of the issue is amendable by inserting the king's name "George"

The record in a penal action may be amended by inserting a *similiter* though the objection was taken at the trial.

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A defective return with in the *venire* is within the statute of amendments;

Or if it be awarded to the sheriffs instead of sheriff;

Or the award M. T. and the teste H. T.

[557]

* The Court are authorized by 8 H. 6. c. 12, to amend the jury process at any time for defects arising from the misprison of the clerks. The *distingas* is amendable by the *venire*, and the *venire* by the award of it on the roll.

† The want of a *venire* is aided after verdict: Cro. Eliz. 259; Bul. N. P. 320; and by the 5 Geo. 1, c. 13. every defect, or fault in judicial writs, and every variance between them and the other proceedings, is aided after verdict; and this statute, it seems, as it relates to judicial writs generally, necessarily includes jury process.

‡ If jury process be awarded to a wrong office, upon an insufficient suggestion, or if the *venire* be in some part misnamed, or sued out of more or fewer places than it ought to be, so as some one place be rightly named; or if any of the jury who tried the issue be misnamed, either in the surname or addition, in the jury process or return thereto, so as it be

writ of error, for then it will appear that it was brought of this very fault; but as he would not waive it, the defendant had leave to amend without paying costs.

(b) Of the *distringas*, or *habeas corpora*.

1. JACKSON v. WARREN. E. T. 1784. K. B. 3 Mod. 73. S. P. THE QUEEN v. TUTCHIN. M. T. 1703. K. B. 6 Mod. 269; Holt, 124; 2 Ld. Raym. 1001.

A *distringas* may be amended after verdict;

On motion in arrest of judgment, on the ground that the day when the assizes were to be held, and the place where, were omitted in the *distringas*; the Court held it sufficient, for if there had been no *distringas* the trial would have been good, because the *jurata* is the warrant to try the cause, which was correct. The *distringas* was accordingly ordered to be amended by the roll. See 1 Roll. Rep. 201; Cro. Jac. 162; 1 Salk. 48; Sira. 136; 1 Com. Dig. 315; 10 Mod. 88; 12 Mod. 107, 274; Ld. Raym. 95, 144; 1 Bac. Ab. 100; 3 Bac. Ab. 275; Comp. 407; T. R. 783; 14 Ed. c. 6; 9 Hen. 6. c. 12; 18 Eliz. c. 14.

2. ANON. E. T. 1689. C. P. 2 Vent. 171.

As *habere facias* instead of *liberari facias*. In the *distringas* the day of *nisi prius* was appointed after the day in bank and after verdict held not amendable by the plea roll because the judge's authority was confined to that day.

After an extent upon a statute and *liberate* out of this court, the writ was *habere fac' terr', et tenementa*, instead of *liberari facias*. A motion was made to amend the word *habere* in the writ, and to make it *liberari*. After several applications, the Court ordered the amendment, observing that this was a judicial writ. See 1 Cro. 709; 3 Co. 1574; 8 Cro. 162.

3. SIR W. L. CHILD v. HARVEY. H. T. 1697. K. B. 1 Ld. Raym. 511; S. C. Carth. 506; S. C. 1 Salk. 48; S. C. 12 Mod. 274.

On a scire facias on recognizance to pay money at a certain day, the defendant pleaded *solvit ad diem*, and issue joined. A verdict was given at *nisi prius* for the plaintiff. On a motion to set aside the verdict, because the *distringas* and *jurata* were returnable in three weeks from the day of the Holy Trinity, unless J. H. &c. shall be first on the 27th of June.

Per Holt, C. J. Though the day of the return of the *postea* should be mistaken, yet, if the cause was tried on the proper day, it would be good; but in this case the day of *nisi prius* being an impossible day, and the judge's authority confined thereto, a trial on another day would be unauthorized, and therefore not amendable; but if the *distringas* and *jurata* had been right, the *nisi prius* roll might have been amended.—Trial was set aside.

4. ADDINGTON v. OAKLEY. E. T. 1697. K. B. 5 Mod. 398.

But if the *jurata* differ in the day, the defendant can not take advantage of it after verdict.

The plaintiff had obtained a verdict at the assizes at Oxford, and a motion was made to arrest the judgment till the *postea* was brought in, as it did not appear to the Court on what day the assizes were held, for the record of *nisi prius* was, to wit, unless the justices of our lord the king of assize in the county aforesaid; assigned to hold pleas, &c. on Thursday, the 16th day of March; at Oxford, &c. The *distringas* for the jury to appear was, if they shall first come on Thursday, the 26th of March, at Oxford. The *jurata* was the same. The defendant moved that it might be referred to the master to be examined, but the Court would not allow it, for that would be to allow an examination of a matter of fact against a record: though the Court also held that the defendant could not take advantage of this after judgment, the clerk of assize being responsible to the party. See Skin. 289; Carth. 32; 1 Sid. 208; Comb. 149; Fitzgib. 174.

5. BULLOCK v. PARSONS. E. T. 1704. K. B. 2 Ld. Raym. 1143; S. C. 2 Salk. 454.

And it is amendable after verdict though there be a blank left for the cause of action;

On issue joined in action of debt, and verdict for the plaintiff; on a motion in arrest of judgment, that the *distringas* was of a plea with a blank, omitting debt; but the *venire facias* was correct; it was urged that the Court would intend this as a *distringas* in another cause, depending between the same parties, which Holt, C. J. denied. For the plaintiff it was insisted.

proved that it was the same man who was meant to be returned; or if there be no return to the said process, so as the panel of the jurors' names be returned and annexed to it; or if the returning officer's name be not to the return, so as it be proved that the writ was returned by the returning officer; all these several defects are aided after verdict by 21 J. 1. c. 13.

this was a void distringas, and consequently aided after a verdict by the statute of joesails; and if the Court would not deem it void, but only an ill distringas, yet they would amend it by the venire facias. *Per Cur.* As to the fault in the distringas being aided after a verdict, there is this difference between no distringas and a bad one; in the first case it is helped, but not in the last; this distringas, however, is amendable.—Judgment for the plaintiff nisi.

6. *WALTHOE v. HARRISON*, T. T. 1733, C. P. Prac. Reg. 22; S. C. Ca. Prac. 101; S. C. Barnes, 5. *S. P. CANE v. MARSH*, E. T. 1733, C. P. Prac. Reg. 23.

On an application for leave to amend a habeas corpora and the jurata in Or in the record, it appeared that the cause had been tried in H. T. and the habeas jurata: corpora was made returnable on Wednesday next, after eight days of the purification of the blessed Mary, or before Sir Robert Eyre, Knt. our Chief Justice of our Court of Common Pleas, if on Thursday the 7th day of February, &c. shall first come; whereas the return should have been on Wednesday next, after fifteen days from the day of Easter, unless Sir Robert Eyre, Knt. &c. on Wednesday, the 13th day of February, shall first come, &c.; [559] and this was moved to be amended. It was urged that this defect was not amendable, and Carth. 506 was cited. *Per Cur.* The mistake is aided by the statute 5 Geo. 1. c. 13. and the case in Carthew may have been correct at the time it was decided; but that was before the statute; and before that act a fault in the habeas corpora was not amendable by the statutes of joesail, although there being no habeas corpora was aided.

The jurata was thus, the jurors, &c. are respited here, until from the day of Easter in fifteen days, unless, &c.; whereas it should have been on Wednesday next, after fifteen days from the day of Easter.

The amendment the Court took time to consider of, and ultimately determined, that the entry of the jurata, being the entry of the clerk, and incorrect through his inadvertence, might be amended.

7. *FRENCH v. WILTSHIRE*, M. T. 1737, K. B. And. 67.

It was moved in arrest of judgment in a popular action, that the distringas was album breve, without any return to it; but it was argued on the other side, that if the venire facias had been album, the distringas would be ill; but as that which is the principal process was right, and well returned, the other was amendable by 8 H. 6. c. 15. as this is only the default of the sheriff; and that it was also helped by 5 Geo. 1. c. 13. which extends to popular actions, these being not mentioned in the exception. But the Court delivered no opinion, because it appeared that the penal was annexed to the distringas; and this they held was a good return; but by Page, J. A bad return is none at all; though by the statute a bad one is amendable. Or if there be no return mentioned. And the same rules apply to penal actions.

8. *WYNNE v. MIDDLETON*, H. T. 1745, K. B. 1 Wils. 125; S. C. 2 Stra. 1227.

In an action upon the case, upon the statute of 7 & 8 W. 3. c. 7. for preventing false and double returns of members elected to serve in parliament, a writ of error was brought, and two special errors assigned; 1st. That there was no venire facias; 2d. That there was no distringas jur'; and then the general errors. Upon certiorari being issued, the Court of King's Bench certified a venire facias and a distringas, and that the jury appeared to be of the body of the country, and not de vicineto. The case then came before the Court upon the general errors only. One objection taken was, that the statute 7 & 8 W. 3. c. 7. is a penal law, and excepted in the 4 & 5. Ann. 16; and therefore the venire ought to have been de vicineto, and not de corpore comitatibus. But the Court thought that it was not a penal statute; but that if it were, it was also a remedial law; and supposing it to be a fault, it was cured by the stat. 16 & 17 Car. 2. c. 8. and they had no doubt but it was cured by the statute 5 Geo. 1. c. 13. which enacts, "that no judgment should be reversed for any defect of form or substance in any bill, writ," &c. so that be this a fault either in form or substance, the latter statute cures it. [560]

(N) OF NISI PRIUS RECORD.*

1. MARTIN V. MONKE, E. T. 1695, K. B. 5 Mod. 211.

The *jurata*
cannot be
amended;

This was a motion to amend a fault in the *jurata* after verdict for the plaintiff. It was, "the jury between the plaintiff and defendant of a plea, &c. is respited before our Lord the King and our Lady the Queen at Westminster, &c. unless our justices, &c. of assize shall first come, &c. 20th day of March;" it should have been before our Lord the King only, and the day of *nisi prius* was mistaken, for the assizes were the 23d day of March. The plaintiff prayed leave to amend. On the other side it was insisted that this was not amendable, for the justices of *nisi prius* had no authority to take such a record. The misprision of a clerk in a writ of *nisi prius* is amendable by the stat. 8 H. 6. but then it must have sufficient matter expressed or implied to give authority to the judge to try the issue; for without that writ he cannot try the cause. In this opinion the Court acquiesced, and held the defect not to be amendable. See *Musgrove v. Wharton*, Cro. Jac. 354; *Blackmore's case*, 8 Co. 161. Y. B.; 11 H. 6 pl. 11; 1 Bac. Ab. 100.

2. DUBARTINE V. CHANCELLOR, E. T. 1696, K. B. 5 Mod. 399; S. C. Carth. 447; 12 Mod. 190; S. C. 1 Lord Raym. 329.

Or can the
nisi roll be
amended
by the inser-
tion after
verdict of a
plea in a
batement;

An action was brought against the defendant for crim. con. He pleaded in abatement, and judgment being given to answer over, issue was afterwards joined, and the cause tried in the country. The plaintiff had a verdict. The defendant moved to set aside the judgment, because the plea in abatement was not entered on the *nisi prius* roll; and although the plea roll might be right, yet the *nisi prius* roll could not be amended by it. The Court entertaining the same opinion, set the judgment aside. See 1 Salk. 47-8; 1 Cro. 274; Comb. 393; 3 Bull. 311; Dyer, 260; Carth. 506.

3. HARPER V. DAVY, 11. T. 1697, K. B. 1 Lord Raym. 510; S. C. 12 Mod. 274; S. C. Carth. 498.

Or a vari-
ance in the
two *nisi*
prius rec-
ords, on a
new trial.

In *assumpsit*, the plea was entered as E. T.; the memorandum was of a bill entered in H. T. On issue joined, the cause was tried, and the verdict afterwards set aside, and a new trial granted and tried. In the *nisi prius* roll the placitas were of Hilary term, and that the party had appeared and pleaded as of that term. The judgment was arrested, because the issue on the plea roll was of E. T. the new trial being but a continuance of the same cause; hence the record of *nisi prius* was different from the plea roll, and therefore bad, according to the preceding case of *Dubartine v. Chancellor*.

4. ANON. M. T. 1701, K. B. 7 Mod. 49.

The *nisi*
prius rec-
ord is how-
ever, in
general a
mendable
by the pa-
per-book;

In an action of *assumpsit*, brought by an administrator for goods sold and delivered by his intestate, and on promise to the administrator, the defendant pleaded non *assumpsit* infra sex annos to the plaintiff; issue was joined thereon, and a verdict for the plaintiff. The omission appearing on the record of *nisi prius*, it was moved in arrest of judgment; but the Court said, if the paper book, or copy of the issue, be right, we will amend it.

5. HALE V. BREEDON, T. T. 1732, C. P. Barnes, 4. S. P. WALKER V. BROOKS, M. T. 1696, K. B. 1 Ld. Raym. 133.

Or by the
plea roll;

The placita in the record of *nisi prius* was of Easter term last; the declaration was in Latin of Hilary, entered with an alias prout patet; the plea was without an imparlance of the same term in English. On motion in arrest of judgment, a rule *nisi* was obtained, which was afterwards discharged, upon showing that the imparlance was entered upon the plea roll, and that the record of *nisi prius* was amendable thereby.

6. WALKER V. LESTER, T. T. 1723, C. P. 1 Com. 376.

Or original
record

This was an action of debt on the statute of Anne against gaming. The defendant pleaded *nil debet*, and the plaintiff, in the record of *nisi prius*, omitted the words *et præd' quer' scilicet*. After trial, and a verdict for the plaintiff, judgment was arrested; and now the plaintiff moved that the record of *nisi prius* should be amended by the original record. *Pcr Cur.* It ought to be amended, for the omission is only the misprision of the clerk.

* The Court may amend the record of *nisi prius* at any time for a defect arising from the misprision of the clerk; 8 H. 6, c. 12; 8 H. 6, c. 13.

- 7 BISHOP OF WORCESTER'S CASE. M. T. 1695. K. B. 1 Salk. 48; S. C. 1 Id. Raym. 94.

Ejectment against seven defendants, who had entered into the common rule for confessing lease, entry, and ouster, and pleaded to issue. The plea roll, venire, distringas, and the jurata, were correct; but the issue in the *nisi prius* roll was between the plaintiff and five defendants only, which was tried, and verdict, &c.; and an amendment being moved for, it was opposed, because it was to alter the verdict, to subject the jury to an attain, to make another issue, and to render two defendants guilty who were not tried, but it was amended, for nothing could be inquired into but the title of the lessor, and the issue depended on his title, which was not altered by this amendment. And it must be considered that all seven entered into the common rule, and the plea roll, &c. are all right, and this cannot be intended other than the same issue, and the amendment is only to rectify a plain mistake, and make the issue what it was apparently intended to be.

8. STONE V. OVERTON. H. T. 1740. C. P. Barnes, 14. S. P. DAYRELL V. BRIDGE. H. T. 1746. K. B. 2 Stra. 1264.

A rule to show cause why a new record of *nisi prius* and ha' cor' jur' should not be made out, and returned by the associate, agreeable to his minutes taken at the trial, the old record having been lost, was made absolute. See 2 Stra. 12. to 4; S. P. id. 1077.

9. MURPHY V. MARLOW AND ANOTHER. M. T. 1807. K. B. N. P. 1 Camp. 57.

On a trial at *nisi prius*, the judge before whom the case was tried perceived that the record was defective, and would have suspended the trial, but the parties wished to waive the objection, if it could be done. Per Lord Ellenborough, C. J. The record may now be amended by rule of court. See 8 Co. 156; 1 Lord Raym. 94; 1 Salk. 48; 2 Wils. 144.

10. REX V. EDWARDS. H. T. 1696. K. B. Comb. 419.

Per Holt, C. J. Amendment is allowed after a writ of *nisi prius* sealed, nay, even after a jury sworn; sometimes a juror is withdrawn, on purpose that there may be an amendment, if it be not entered on record.

11. PAINE V. BUSKIN. T. T. 1815. K. B. N. P. 1 Stark. 74.

In an action on a bond an application was made for leave to amend the record by inserting a profert; but Per Lord Ellenborough, C. J. This amendment is too material to be granted at *nisi prius*.

12. WRIGHT, *qui tam*, v. HORTON. T. T. 1816. C. P. N. P. 1 Stark. 400.

An objection was taken at the trial of a *qui tam* action on the ground that a *similiter* was wanting to the *nisi prius* record; but Wood, B. overruled the objection, and held it immaterial. Subsequently the Court was moved, but they concurred with the learned judge.

13. HALHEAD V. ABRAHAM. T. T. 1810. C. P. 3 Taunt. 81.

In an action upon a replevin bond, the instrument produced at the trial, and the security stated in the declaration, appeared at variance; the one describing the chattels as three dozen chairs, the other four dozen. Bayley, J. nonsuited the plaintiff, observing, that had he been a judge of the court in which the action was brought, he would have ordered the amendment at *nisi prius*. The Court, however, afterwards directed it to be made, and a new trial had.

14. DOE, *ex dem.* MEARS, v. DOLMAN. E. T. 1798. K. B. 7 T. R. 618.

In ejectment, a rule was obtained to show cause why the lessor of the plaintiff should not be at liberty to amend the plea roll and record of *nisi prius*, by making them of E. T. 1792, instead of E. T. 1797, upon an affidavit stating that the declaration was served on the tenants on the 22d of March, 1792, and that afterwards the usual rules had been entered into. *Per Cur.* There is no instance in which the Court have refused the parties leave to amend, to prevent their being barred by the statute of limitations for a supposed laches of

* When amendments are made at the trial, they are made without costs; 3 Taunt. 8.

† But now, by 1 G. 4. c. 55. a judge on the circuit may order such an amendment whether he be a judge of the court in which the record was made up.

Where the issue in ejectment was against 7 defendants, and the *nisi prius* roll was by mistake against 5 only, the Court amended the latter by adding the names of the remaining two defendants.

[562] A new *nisi prius* record ordered to be made out and returned by associate agreeable to his minutes taken at the trial the old one being lost, the *nisi prius* record is amendable by consent after the issue called on; Or a juror may be withdrawn for the purpose; Provided the alteration is not material; And the omission of the *similiter* need not be amended. Formerly the amendment could not be ordered unless the presiding judge was of the court in which the action was brought.† [563] Such amendments may be

made after verdict, where the justice of the case requires it.

Hence after a nonsuit for a trial, the Court granted a new trial, with leave to amend the declaration generally on payment of costs; but on a variance between the nisi prius record and the issue, the objection must be made at the time of the trial, for the Court will not set aside the verdict. The nisi prius roll was amended by inserting a special title to the declaration, as the defendant had been under age at the beginning of the term to which the general title of declaration referred.

[564]

which they really have not been guilty; it is a matter of course to grant such permissions to enable the Court to arrive at the real justice of the case.—Rule absolute to amend.

15. WILLIAMS v. PRATT, T. T. 1822, K. B. 5 B. & A. 896.

The Chief Justice had nonsuited the plaintiff on an important variance between the contract set out in the declaration and the agreement produced at the trial. A motion was afterwards made to the Court for leave to amend the declaration, on payment of costs. The Court, after argument, and on the authority of *Halhead v. Abraham*, *supra*, made the rule absolute, with liberty for the defendant to plead *de novo*. *Vide Hare v. Mills*, 4 M. & S. 470.

16. LEEMAN v. ALLEN, E. T. 1763, C. P. 2 Wils. 160.

Trespass, assault, and imprisonment, to the plaintiff's damage of 300*l*. The defendant pleaded the general issue. Upon the trial the jury gave a verdict for the plaintiff and 300*l*. damages. In the paper book containing the issue, delivered to the defendant, with notice of trial, the damages, by mistake, were laid only at 200*l*. but the record of nisi prius was agreeable to the roll, which was 300*l*. damages. After a defence made at the trial, it was moved for the defendant to set aside the verdict, on account of the variance. *Sed per Cur.* As the defendant made a defence at the trial, the Court cannot set aside the verdict for the variance between the issue book, delivered in paper, and the record of nisi prius, which was not mentioned or objected to at the trial; and if the record of nisi prius had been incorrect, the Court would have mended it by the roll, after a verdict and defence made. See *Cooper v. Spencer*, 8 Mod. 376; S. C. 1 Stra. 641.

17. BOYS v. EDWARDS, H. T. 1815, K. B. 2 Chit. Rep. 22.

A rule nisi had been obtained to amend the nisi prius roll, by inserting a special title to the declaration, the defendant not being of age at the beginning of the term, to which period the declaration being entitled generally, referred, and his appearance being recorded as on the day when he became of age. *Per Cur.* Let the rule be absolute, on payment of costs. See 1 Wils. 78; 7 T. R. 474; 8 id. 629; 1 East, 134.

by inserting a special title to the declaration, as the defendant had been under age at the beginning of the term to which the general title of declaration referred.

(O) OF THE VERDICT.

(a) Of a general verdict.

1. WILLIAMS v. JONES AND ANOTHER, E. T. 1734, C. P. Barnes, 6.

A mistake of the associate may be amended in the *postea*,

A verdict was taken by mistake of the associate generally for the plaintiff against both the defendants, instead of finding E. J. not guilty. As to the other defendant, a verdict was found for the plaintiff, damages 200*l*. The plaintiff moved that the return of the *postea* as to Jones might be amended, which was ordered, on the judge's report.

2. THE KING v. KEAT, H. T. 1693, K. B. 1 Salk. 48.

By the notes of the clerk of assizes.

A verdict, general or special, may be amended by the notes of the clerk of assizes in civil, but not in criminal cases. See 1 Roll. Rep. 82; 3 Cro. 144, 150; Cro. Car. 145, 388; 2 Co. 185; Skin. 666; 4 Co. 52; Holt, 481; *post*, Amendment in Criminal Proceedings.

3. EDDOWS ET AL. v. HOPKINS ET AL., E. T. 1780, K. B. Doug. 375.

And a general verdict on a declaration consisting of different counts, some of which are bad in point of law and evidence has

In an action of assumpsit, brought against the defendants, as the executors of one H. the declaration contained several counts, some upon promises made by the defendants themselves. To the first set of counts the defendants pleaded *plene administravit*; and to the others, the general issue. The jury, on the trial, found for the plaintiff, with 147*l*. damages, and a general verdict was entered by the officer. Afterwards a motion was made in arrest of judgment, on the ground that the verdict was general, and the counts inconsistent, and such as required different judgments to be entered, viz. judgment *de bonis testatoris* on those where the promises were laid to have been made by the testator, and *bonis de propriis* on the others. The plaintiffs then applied to have the *postea* amended by the judge's minutes, and a verdict entered for the

plaintiffs on those counts only to which the evidence given at the trial applied, and for the defendant on the others. On these motions coming on together, *Per Cur.* It is impossible to believe there was such an absurdity in the law as that a mere mistake of the officer should be without a remedy, and that neither the judge or jury could proceed on what there was no evidence of before them. The Court then mentioned a case where one Gibson had been tried and convicted; but a mistake being discovered in the verdict, a consultation of all the judges was held, when the mistake was corrected from minutes signed by the jury, and the prisoner executed. Now here there is this distinction, that if there was only evidence at the trial upon such of the counts as were good and consistent, a general verdict might be amended from the notes of the judge, and entered only on those counts; but that if there be any evidence which applies to the other bad or inconsistent counts (as, for instance, in an action for words, where some actionable words are laid, and some not actionable, and evidence given of both sets of words, and a general verdict), there the *postea* cannot be amended, because it would be impossible for the judge to say on which of the counts the jury had found the damages, or how they had apportioned them; that in such a case the only remedy is by awarding a *venire de novo*. But in this case the rule to arrest the judgment was discharged, and the other made absolute, but on the payment of costs, including those of the motion in arrest of judgment.

4. *PETRIE v. HANNAY*, E. T. 1790, K. B. 3 T. R. 659.

To an action for money paid by executors, and for money paid by their testator to the use of the defendant. Pleas; 1st. The general issue; 2dly. The statute of limitations. The plaintiffs having obtained a general verdict on the first issue, and the last remained unobserved, the defendant brought a writ of error in the House of Lords upon two grounds; 1st. That no verdict was given on the second plea; and 2dly, That two separate demands had been joined in one action. After a joinder in error, a rule was obtained in the King's Bench to show cause why an amendment should not be made according to the judge's note, by adding a verdict for the plaintiff on the second plea, and by entering the verdict on the counts for money paid by the executors, and for money had and received to their use. *Per Cur.* Such amendments have been permitted; the first is merely the misprision of the clerk in not entering up the verdict for the plaintiff on the second plea; and as to the second it is not error, for though an executor, when suing for a debt due to his testator, could not join a debt due to himself in his own right, yet it is the constant practice to join in the same declaration several counts for money had and received by the defendant to the use of the testator, and to the use of the executor as such; and therefore the rule must be made absolute.

5. *DOE, ex DEM. CHURCH v. PERKINS AND OTHERS*, T. T. 1890, K. B. 3 T. R. 749.

The *postea* in an ejectment in which the plaintiff had obtained a verdict, stating, that "as to the premises in the declaration mentioned, except as to two cottages, parcel thereof," twenty-two of the defendants, naming them, were guilty; and, "as to the said two cottages, parcel of the premises, in the said declaration mentioned," that the said N. and M. were not guilty. On a writ of error and joinder therein, the defendant, in error, applied to the judge who tried the cause to amend the *postea* by his notes; which he did by directing that the words within the inverted commas, as above, should be struck out. He also applied to Buller, J. to amend the judgment roll, who ordered that the defendant should have a rule to move for a new trial, and if refused that the lessors of the plaintiff should be at liberty to amend the roll. A motion was made for a new trial, which was granted, and afterwards to set aside the order for the amendment made by the judge who tried the cause, on two grounds; 1st. Because it was an amendment by a judge of another court, and after the expiration of one term after the trial; 2dly. Because the amendment was not warranted by the judge's note. *Per Cur.* There is no foundation for the first objection, for, according to the practice of amending by the judge's notes, it may be made at any time; and that as to the second objection, it might

only been given on the good counts, the verdict may be amended by the judge's notes.

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So where the defendant pleads the general issue and the statute of limitations, and a verdict was found for the plaintiff on the first issue, but no notice taken of the last, the Court allows it to be amended, even after this defect, and joinder in error, on payment of costs.

And after a writ of error brought in error, the judge who tried the cause may, upon application, amend the *postea* by his notes; [566]

But where some counts in a declaration are good and others bad and general

damages are given, the Court will not allow the verdict to be amended by the judge's notes.

Aliter, when the evidence has been confined to a particular count.

Where the similiter was added by the plaintiff instead of taking issue and a verdict given for the defendant, the Court refused to set aside the verdict but allowed an amendment of the record.

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Where a specific fine, imposed by statute for a misdemeanor, was mis-calculated in the verdict and judgment the Court refused to alter the verdict & judgment. A verdict taken, subject to a reference, can not be amended by increasing the sum named in the declaration and rule of reference, on an affidavit that a larger sum would probably be proved before the arbitrator.

have been determined when the rule for granting the new trial came before the Court; and if according to that report the evidence did not correspond with the amendment, the defendant might then have availed himself of the objection.

6. *HOLT v. SCHOLEFIELD*, T. T. 1796, K. B. 6 T. R. 691.

On a motion in arrest of judgment in an action for words, it appeared that some counts in the declaration were good, and others bad in law, and that general damages had been awarded. *Per Cur.* There cannot be a *venire de novo*, and the damages being entire, the judgment must be arrested in toto, for the plaintiff cannot be allowed to amend the judge's notes in this case, since the evidence applied as well to the bad counts as to the good ones.

7. *WILLIAMS v. BREEDON*, M. T. 1798, C. P. 1 B. & P. 329.

This was an action of trespass by an executor, which contained counts for injuries to the testator's property not sustainable by the plaintiff in his representative capacity, as well as others that were not open to that objection. The jury found a verdict with general damages, subject to the opinion of the court, as to the tenability of the action. On the Court being moved it was suggested, that even admitting the invalidity of some of the counts, yet, as it was shown by the judges that the jury had found their verdict on the evidence applicable to the valid parts of the declaration only, judgment ought to be entered on those counts. *Per Cur.* As the evidence adduced clearly shows that the jury must have formed their estimate on the valid counts, the judge is entitled to alter the *postea*.

8. *GRUNDY v. MELL*, E. T. 1804, C. P. 1 N. R. 28.

A rule nisi was obtained to set aside a verdict which had been given for the defendant, on the ground that the record purported to try a certain issue; whereas the rejoinder had concluded with a verification, instead of to the country, to which the plaintiff added a similiter; a rule nisi was also obtained by the defendant to amend. *Per Cur.* Upon the authority of *Sayer v. Pocock*, Cowp. 407. where a similiter was added after verdict, the present rule for the amendment must be made absolute. It is only making that right which the defendant understood to be so, by going down to trial.—Rule discharged for a new trial. Rule absolute for the amendment.

9. *REX v. STEVENS*, E. T. 1803, K. B. 3 Smith, 366.

It appeared that a fixed fine for a misdemeanor had been miscalculated in the verdict and judgment. It was now moved to amend. *Per Cur.* A rule having been served upon all parties interested. we will alter the rule for the judgment against the prisoner, and the entry-roll as to part of the punishment, but we cannot alter the judgment and verdict.

10. *PEARSE v. CAMERON*, T. T. 1813, K. B. 1 M. & S. 675.

This action had been brought on a balance of accounts. A verdict had been taken for the plaintiff for the damages in the declaration, subject to a reference of all matters in difference. A rule nisi was moved for to amend the original writ, declaration, nisi prius record, and rule of reference, by inserting the sum of 10,000*l.* instead of 25,000*l.* the sum laid in the declaration. The affidavit in support of the motion stated, that a much larger sum than that for which the verdict was taken would probably be proved before the arbitrator. *Per Cur.* We cannot increase the sum as prayed.—Rule refused.

11. *USHER AND ANOTHER v. DANSEY AND OTHERS*, E. T. 1815, K. B. 4 M. & S. 94.

In an action upon a bill of exchange for 1475*l.* 13*s.* the damages were laid at 1630*l.* A verdict was given for 1685*l.* being the amount of principal and interest; for which sum, together with costs, judgment was entered. A writ of error was brought in parliament, assigning for cause the excess of the verdict above the damages laid in the declaration. Joinder in error. A rule nisi was obtained in the subsequent term for liberty to amend the judgment-roll by entering a remittitur of 35*l.* and to have judgment for the residue, and also to amend the transcript on payment of costs in error, &c. *Per Cur.* There are two express authorities for allowing this amendment, the case of *Hardy v. Cathcart*; Marsh. Rep. 180; 5 Taunt. 2. S. C.; which was a penal action,

where the jury found a verdict for the plaintiff with one shilling damages; which was irregular, because damages cannot be given for the detention of the debt in a penal action. In that case Heath, J. said, "It was a rule at common law, that a judgment could not be amended after the term in which it had been entered up; but that several statutes had corrected and supplied this defect in the law, and particularly the 8th of Hen. 6, relieved in all cases where the error had arisen from the misprision of the clerk." In *Pickwood, v. Wright*, 1 H. Bl. 643, a similar leave was given to enter a remittitur of the damages found beyond the sum laid in the declaration pending a writ of error. Rule absolute. See 1 Roll. Ab. 578; 2 Show. 1110; And. 384. S. C.; 10 Co. 1776; 8 H. 6, s. 5, a; 42 Ed. 3, s. 7; Owen. 45; 2 Bac. Ab. Gwill. edit 267. Damages, D. 2; 1 Wils. 30; 8 Rep. 157, 162; Vin. Ab. Amendment, F. pl. 2; 8 Mod. 304; 5 Burr. 2730; Gilb. C. P. 108; And. 351; 2 Bl. Rep. 1300; 3 T. R. 659, 749; 5 id. 577; 7 id. 474; 3 M. & S. 591.

If larger damages are given than laid in the declaration, and judgment is entered for the whole after error brought, as signing this for the excess, the of a term subsequent to judgment, the jury, in a penal action, give damages by mistake

12. *HARDY, qui tam, v. CATHCART, CLERK*, E. T. 1814, C. P. 1 Marsh. 180. This was an action for non-residence, founded upon the statute 43 G. 3, c. 84. The jury found a verdict for the plaintiff, giving one shilling damages. A writ of error was afterwards brought, assigning for cause that the verdict had been erroneously entered for damages and costs. A rule nisi was now obtained to enter a remittitur of the damages on the record of the judgment, and amend the transcript of the record. *Per Cur.* The stat. of Hen. 6, relieves in all cases where the error has arisen from the misprision of the clerk; let the rule be made absolute. Rule absolute. See Roll. Ab. tit. Amendment; 14 Ed. 3, st. 1, c. 6; 9 Hen. 5, st. 1, c. 4; 8 Hen. 6, c. 12. & 15; Gilb. C. P. 116; 4 Burr. 1289; Doug. 114; 1 Salk. 51; 2 Lord Raym. 1307; 3 T. R. 749.

the plaintiff after a writ of error, brought, may enter a remittitur on the record as to the damages, and also amend the transcript of the record.

13. *HARRISON v. KING*, M. T. 1817, K. B. 1 B. & A. 161.

Where a general verdict had been taken for the plaintiff, the Court after a lapse of 8 years, and after the judgment had been reversed

A general verdict had been taken for the plaintiff. A motion was now made to amend the record by entering the verdict upon those counts only on which evidence had been given at the trial according to the judge's notes. It appeared that the verdict had been obtained in 1809, and that the defendant had brought a writ of error, upon which the judgment had been reversed in respect of one of the counts being defective, in support of which no proof had been offered at the trial. *Per Cur.* At this distance of time the present application cannot be allowed. The plaintiff has, however, no reason to complain, as his attention ought to have been aroused by the writ of error.—See 3 M. & S. 110; 7 Taunt. 431; post, tit. *Harris v. Davis*.

in error on one count, upon which no proof had been offered at the trial, refused to allow the verdict to be amended, by entering it on particular counts, according to the evidence on the judge's notes.

14. *HARRIS v. DAVIS*, M. T. 1818, K. B. 1 Chit. Rep. 625.

Though in general, where there is a misjoinder of counts, and no evidence is given on some of them, the verdict if taken general ly, may be amended according to the evidence.

In this action a general verdict had been obtained for the plaintiff, and general damages assessed. A motion was now made for a rule to arrest the judgment, or to set aside the verdict and have a new trial, as there had been a misjoinder of counts, one count being partly in case and partly in trespass, and another count entirely in trespass. *Per Cur.* The trespass was not proved, and no evidence seems to have been offered, as to that point. The plaintiff could therefore prevent you from deriving any benefit from this motion by amending the verdict, and confining it to that part of the declaration on which evidence alone was given. You may take a rule to arrest the judgment, but it will be in that case of no avail. The grounds for setting aside the verdict were stated but the Court finally granted a rule nisi to arrest the judgment. See 4 T. R. 794; 6 Taunt. 29.

15. *FERRIS v. WEALE*, E. T. 1818, C. P. 2 Moore, 215.

In this action the defendant had pleaded six different pleas. The plaintiff had joined issue on the two first pleas, and tendered issue on the third, fourth, and fifth; but there was no replication to the sixth plea, which remained wholly unanswered. The defendant added a similiter to the third, fourth, and fifth

pleas; and the plaintiff did not reply to the last, of which omission he was cognizant before trial, and they were found for the plaintiff by the award of an arbitrator, without prejudice to the objection on the record the Court would not permit the plaintiff to amend, and a rule obtained by the defendant to arrest the judgment was discharged as he might bring a writ of error. The Court refused to amend the entry of a verdict by the notes of an arbitrator, to whom the cause had been referred, as they could not compel the production of those notes. *Semb.* that where a similar amendment is prayed from the notes of a judge, application must be made to him, and not to the Court.

Where in an action on 2 & 3 Ed. 6, c. 12, for not setting out tithes, the jury found damages which a mounted only to the single value. The *postea* was not allowed to be amended by entering the verdict for the treble value according to the statute.

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A special verdict that error brought this omission of the jury in the verdict was assigned for

on which issue was joined. A verdict had been taken by consent for the plaintiff for nominal damages, subject to the award of an arbitrator, who was empowered to direct that a verdict should be entered for the plaintiff or defendant, as he should think proper, without prejudice to the objection on the record, viz. that the plaintiff had omitted to answer the defendant's last plea. The arbitrator found the first and second issues for the plaintiff, and the third, fourth, and fifth, for the defendant, damages one shilling. A rule nisi had, under these circumstances, been obtained to amend the issue, roll, and record, by adding a traverse to the 6th plea, and a similiter thereto. A rule nisi had been also obtained, on the part of the defendant, in arrest of judgment. *Per Cur.* As no case has been cited to show that the Court have ever granted an amendment where the defect in a record has been pointed out previous to trial, or where the party in whose hands the record is, afterwards goes on to trial, or where a plea is left wholly unnoticed in the record, we cannot allow the amendment prayed. The rule in arrest of judgment must also be discharged; for if the plaintiff enters up judgment on the record as it now stands, the defendant may afterwards, if he deems it advisable, bring a writ of error.—Rules discharged. See 5 Taunt. 164; 1 N. R. 28; Cowp. 407; 1 M. 641; 8 Mod. 376, S. C.

16. SOUGULL AND OTHERS V. CAMPBELL AND OTHERS, E. T. 1819, K. B. 1 Chit. Rep. 283.

A motion was made in this case to show cause why the entry of the verdict should not be amended according to the notes of the arbitrator, to whom the case had been referred. *Per Cur.* Where a party is even desirous of entering a verdict according to the judge's notes, the application for that purpose must be made to the judge who tried the cause, although he be a judge of a different court from that in which the action is brought. The Court have no power to compel the productions of the judge's minutes. The present application is to amend the verdict according to the judge's notes, which are supposed to be in the custody of the arbitrator, to enable him to make his award; but as we cannot make any award as to the notes of the judge, still less can we as to those of the arbitrator.—Rule refused. See 3 T. R. 749; 1 B. & A. 163; 4 Doug. 376; *Graham v. Bowham*, MS. cited 1 Chit. Rep. 284.

17. SANFORD V. PORTET, AND SAME V. CLARKE, H. T. 1820, K. B. 2 Chit. Rep. 251.

These actions were brought on the statutes 2 & 3 Ed. 6, c. 13, for not setting out tithes. The jury had found verdicts for the plaintiff to the amount of 110*l.* being the single value of the tithes not set out. It was now moved to amend the *postea*, by entering the verdict for treble the value assessed by the jury, pursuant to the statute. *Per Cur.* We cannot amend the *postea*. The defendant has pleaded nil debet; upon which issue it has been found that the defendant owes the amount of the single value. We are bound to conclude that the jury have taken into their consideration all the damages that the plaintiff was entitled to recover. In the case of *Baldwin v. Gillet*, Godb. 341. which has been relied on, the jury found as and for single damages specifically; in that case the plaintiff was entitled to come into court, and have judgment entered up for treble value; but here the verdict being entered generally without any thing to show that the jury have found the single value only. We must refuse the rule.—Rule refused.

(b) Of a special verdict.

1. MILLER V. TRETS, M. T. 1696, Ex. Ch. Ld. Raym. 324.

An information had been exhibited against the defendant in the Court of Exchequer, for selling lace and silks, &c. Upon issue joined, the jury found the defendant guilty, as to selling the lace, &c. but stated nothing in their verdict as to the silks. Judgment in the Exchequer for the informer. Upon error brought this omission of the jury in the verdict was assigned for

error; upon which a motion was made in the Exchequer for leave to amend, but denied by the Court.—Judgment reversed.

2. *THE KING v. KEAT*, H. T. 1695, K. B. 1 Salk. 47. *CROMWELL v. GRAMDEN*, E. T. 1768, K. B. 1 Ld. Raym. 335.

A verdict, general or special, may be amended in civil, but not in criminal cases, by the notes of the clerk of assize, or on a special verdict, by the notes of counsel in the cause after error brought. See Bull N. P. 320.

3. *MAYHOE v. ARCHER*, T. T. 1721, K. B. 8 Mod. 46; S. C. 1 Stra. 513.

On a special verdict, the jury found that R. B. rented a farm for which he paid 300*l.* per ann. and that he had planted potatoes on part of the land; that he brought great quantities of potatoes to sell for profit; that for several years past he dealt with several persons in potatoes at several times and places, and had employed warehouses where he deposited them, and had served several markets therewith. A motion was made for a new venire, or that the Court would give leave to amend the verdict upon an affidavit of one of the witnesses at the trial, that B. bought potatoes several years to the value of 500*l.* per ann. A rule was accordingly made for the other side to show cause why the verdict should not be amended; and on cause being shown, it was stated that though the witness had sworn the same thing at the trial, yet it was without precedent to have a verdict (which is a record) amended by such an affidavit; for though it was the same which was given in evidence before, yet the jury did not believe it, or probably there might be other evidence at the trial to disprove it. But the Court was of opinion that a special verdict might be amended by notes taken by the clerk at the trial, or on proof of the certainty of what was then given in evidence; and the same was ruled accordingly upon payment of costs.

4. *MANNERS v. POSTAN*, H. T. 1803, C. P. 3 B. & P. 343. *S. P. NEWCOMBE v. GREEN*, M. T. 1743, K. B. 2 Stra. 1197; S. C. 1 Wils. 33.

Action upon the statute of Anne for usury. The jury found verdict for the plaintiff stating, that the defendant took 5*l.* for the use of 50*l.* from the 14th of April to the 14th of July; but this finding was inconsistent with the real facts, as the note itself did not become due till the 15th. A motion was made for leave to amend the verdict by the judge's notes, which was opposed by the defendant, on the ground, that where a jury have found a particular fact incorrectly, there was no means of rectifying the mistake but by sending the case to a new trial. But the Court were of opinion that the verdict might be amended according to the judge's notes, without exceeding those boundaries which prior cases had fixed to such indulgences.

5. *DOE, DEM. HITCHINS, v. LEWIS*, T. T. 1752, K. B. 1 Burr. 617.

The counsel, in arguing the special case prepared in this cause, was departing from the facts detailed in it, when Lord Mansfield interrupted him, observing that the Court must determine upon the case as stated; and that if it be mis-stated, the party must apply to amend it.

(P) OF THE JUDGMENT.—See tit. Warrant of Attorney.

(a) Before a writ of error.

1. *TREVANION v. TOOKER*, M. T. 1607, K. B. 12 Mod. 312.

Per. Cur. A plain mistake of a clerk in entering up judgment may be amended by the consent of the party entitled to take advantage of the mistake.

2. *DELABARRE AND ANOTHER v. YARDLEY*, M. T. 1660, K. B. T. Raym. 42.

In an action on the case part is found for the plaintiff, and the residue for the defendant, and as to that part which is found for the defendant the judgment

* Or by the memory of the judge who tried the cause; *Elliott v. Skyppe*, M. 1635, Cro. Car. 333. These amendments may be made even after argument; the Attorney General *v. White*, Bonb. 283.

† By the statute 16 & 17 Car. 2. c. 8. no judgment after verdict, confession, per cognit actionem, or relicta verificare shall be reversed of a misericordia, or capiatum, or for that a misericordia is entered for a capiatum, or vice versa. Nor by the stat. 4 & 5 Ann. c. 16, judgment by confession, nil dicit, non sūm informatus, or when a writ of inquiry is executed; or that ideo concessum est per curiam is entered for ideo consideratum est per curiam;

Does not comprehend the whole issue is erroneous and not amendable. But in general a special verdict may be amended by the minutes taken by the clerk of assizes notes of counsel. Or even by an affidavit of what was proved on the trial;

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A special case if mis-stated may be amended. A mis-entry of judgment by the clerk may be amended by consent. Qu. Whether before the statute 16 & 17 Car. 2. c. 8. quod que rens et ple gii sui sunt in misericordia could be

amended
by erasing
plegii sui.
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ment is entered *quod querens et plegii sui sunt in misericordia*. On motion that the judgment should be amended, and *plegii sui* struck out, because they ought not to be amended. *Per Cur.* We must take time to consider.—
Adjourned.

3. FETTYPLACE'S CASE, M. T. 1668, K. B. 1 Mod. 15.

The misprision of office would "affcerere," instead of "affere," &c. a motion was made in arrest of judgment, and the case of *Bedel v. Sir Edward Wingfield*, Cro. Eliz. 466. was cited. Twiaden, J. said, he remembered "*distriktionem*" for "*distractionem*," cannot be helped; so neither "*vaccaria*," for "*vicaria*." So the Court gave directions to see if it was right on the roll. See 1 T. R. 783; Doug. 194; Cowp. 229; 10 Mod. 88; 2 Barnes, 123.

4. ANON. T. T. 1670, K. B. 1 Vent. 132.

Or quod recuperet, &c. After verdict for the plaintiff in an action of debt on bond, the judgment was entered *quod recuperet*, the sum *pro misia et custag'* instead of *pro debito præd'*. The Court ordered the amendment, it being the misprision of the clerk.

5. DEUOREN V. WALCOT, H. T. 1680, K. B. T. Jones. 199.

Or recuperet, where there are 2 plaintiffs; Or attach suit instead of sum fuit; On an objection that the judgment was *recuperet*, there being two plaintiffs, amendment ordered.

6. RAYNER V. ARNOLD, T. T. C. P. Ca. Prac. 9.

On a motion for leave to amend a common judgment in debt by confession, in which there was a mistake, for it was entered "*attach fuit*," instead of "*sum fuit*," the Court made the rule to amend the record absolute.

7. ANON. H. T. 1686, K. B. Comb. 71.

If a judgment is entered on the roll, with blanks, they may be filled up without notice, within the year.

8. WHITE V. BRIGGS, M. T. 1693, K. B. Comb. 300.

On a motion to amend a judgment, it being "*querens in Mia*," instead of "*def. in Mia*," the Court ordered the amendment.

9. CRADOCK V. RATFORD, H. T. 1693, K. B. 4 Mod. 371.

Judgment had been signed twenty years before the present application. On its revival by *scire facias* against the heir and ter tenants, the judgment stated, "that the aforesaid Thomas might recover," instead of "the aforesaid Arthur." The Court was moved that the roll might be brought in and amended, it being only the fault of the clerk. The defendant's counsel urged that it was not amendable, being an error in judgment, which must be considered as an act of the Court, and not of the clerk. But *per Cur.* These amendments have frequently been made, and the Court directed the same accordingly. See 12 Mod. 384; Stra. 1132.

10. CHATTLE V. LEES, H. T. 1689, K. B. 4 Mod. 6.

The plaintiff obtained a verdict, and the judgment was entered with a *misericordia*, instead of *capiatur*. The defendant's counsel moved to arrest this judgment, because it was an error not amendable by stat. 8 H. 6. for that act only aided the misprision of clerks in entries of judgment, but this was the fault of the Court in giving judgment. *Sed per Cur.* This is now remedied by stat. 16 & 17 Car. 2. c. 8. which enacted that judgment shall not be stayed after verdict for want of *misericordia* or *capiatur*. See Palm. 98; Hob. 127; 2 Saund. 289; 1 Roll. Abr. 266.

11. HANCKFORD V. MEAD, E. T. 1699, K. B. 12 Mod. 384.

A judgment for damages was, "that the aforesaid A. recover," instead of "the aforesaid B.;" and it was amended on motion. Gould, J. said he remembered a case where the like fault was amended on motion, after 20 years.

Or defend ant for plaintiff; or that the costs increased after verdict in an action or nonsuit in replevin are not entered to be at the request of the party for whom judgment is given; or that costs de incremento in any case are not entered to by consent of the plaintiff. Provided not to extend to any appeal, indictment, presentment, or action on any penal statute, unless for customs of tonnage and poundage.

12. ABRAHAT v. BUNN, T. T. 1715, C. P. 1 Com. 250.

This was an action of a debt upon a bond, with condition that the defendant should pay 50*l.* to one Eyres on such a day; and should indemnify the plaintiff who was bound with the defendant in another bond to Eyres for the payment of the same sum. The defendant pleaded solvit ad diem; the plaintiff replied, quod præd' Johannes Bunn non solvit prout idem Johannes Bunn superius allegavit el hoc petit quod inquirat per patriam, &c. præd' Johannes Abrahat similiter, where it should have been præd' Johannes Bunn similiter, after a verdict for the plaintiff, without any defence made by the defendant, upon whom the issue lies; a motion was made in arrest of judgment on the ground of the misprision, and it was contended that the statute 17 Car. 2. c. 8. did not extend to this case, for that aids a mistake of the name where the plaintiff or defendant has been rightly named before, and where that might be shown for cause on a demurrer, but that could not be done here, in which the Court acquiesced.

13. WARING v. BLECHINGTON, E. T. 1738, C. P. 7 Mod. 291. S. P. Foster v. Blackwell, E. T. 1736, C. P. Barnes. [574]

A rule nisi was obtained to amend a judgment entered on the roll in a subsequent term to that in which judgment was entered. The amendment desired was to insert do recover instead of ought to recover, the latter being uncertain, and not a judgment to recover. Against the amendment it was contended that it is an error in law, and not the misprision of a clerk, and therefore ought not to be rectified in a subsequent term. *Per Cur.* We are all of opinion that the amendment should be made, for as the words now are, it is no judgment of the Court, but a mere nullity; the statute 16 & 17 Car. 2. warrants it; for though it does not fall within the instance there given, yet it is a mistake of a similar nature. See Lord Raym. 1570; Doug. 116; 1 Vent. 132; 1 Com. Dig. Amendment, k; Blackmore's case, 8 Co. 156; Cro. Eliz. 497; Palmer, 198, 259; 1 Roll. Ab. 201; 1 Brownl. 56; 1 Lev. 430; 5 Mod. 147; 1 Vent. 132; Hob. 327; Cro. Jac. 603; 2 Leon. 122; Cro. Eliz. 203; Stiles, 265; 1 Roll. Ab. 751; 1 Sid. 70.

14. SHORT v. COFFIN, EXECUTOR OF B. COFFIN, E. T. 1771, K. B. 5 Burr. 2730. [575]

In an action brought against an executor, the judgment was entered by mistake de bonis propriis; and upon a motion for leave to amend by making it de bonis testatoris, si, &c. et de bonis propriis, si non, &c. the Court were of opinion that the amendment ought to be made, it not being an error in point of law, but a mere mistake of the clerk.

15. RAY, ADMINISTRATOR, v. LISTER, H. T. 1738, K. B. And. 351.

Debt, upon two judgments, one of which was for 30*l.* and the other for 10*l.* and the plaintiff alleged his damage 10*l.* The defendant pleaded payment, but on the trial made no defence, and the jury found for the plaintiff, and gave 30*l.* damages. On motion to amend the declaration by inserting 40*l.* damages instead of 10*l.* it was insisted that this ought to be permitted, it being no alteration in the verdict or judgment, but in the declaration, and only a single word, and it tends to the furtherance of justice; and besides, the mistake is to be considered as the misprision of the attorney. *Per Cur.* We are of opinion that the matter prayed to be amended cannot be called the misprision of the clerk, it being the demand, and consequently the instruction of the plaintiff, hence it cannot be altered, for the Court has no authority to increase the parties own demand. The statute of Hen. 6. upon which this motion must be founded, has been expounded to extend only to the plain apparent misprision of the clerk, where he had something before him to go by. The only proper course for the plaintiff to have taken was, to have remitted so much of the damages as exceeded what is laid.—Motion refused. Sed vide 2 Arch. Prac. K. B. 244; post, 576.

16. GRABBORN v. RAILER, T. T. 1699, K. B. 12 Mod. 402.

The warrant of attorney was to confess judgment as executor, and being entered generally several terms before the present application, it was now amended according to the warrant. Vide post, tit. Warrant of Attorney.

A warrant of attorney to confess a judgment is amendable.

17. JASON v. MORGAN, M. T. 1663, C. P. 1 Lev. 150.

Even altho' forty years have elapsed.

On an application for leave to amend, it appeared that judgment had been obtained forty years since, and no warrant of attorney to acknowledge satisfaction was entered until two years ago, when the entry was, "he acknowledged himself about to be satisfied," instead of "he was satisfied." *Per Cur.* This being merely a misprision of the clerk, the rule for the amendment must be absolute.

But where blanks had been left for the quantum of damages the Court, after a period of 19 years, refused to amend it;

18. SIR WILLIAM WENTWORTH v. THE COUNTESS OF STRAFFORD, H. T. 1695¹ K. B. 5 Mod. 167; S. C. 1 Lord Raym. 68.

Or to amend a judgment entered up on a warrant of attorney as to the

names of the defendant, though the warrant was correct in that respect.

[576] If in an action on a judgment there is a variance between the record when produced and the declaration, the Court will permit an amendment, on payment of costs.

If an executor pleads a false plea on which judgment is entered against him for the debt and damages de bonis

The late Earl of S. in 1676, gave a warrant of attorney to confess judgment, at the plaintiff's suit; the instrument was given to S. an attorney in the country, and sent to W. who was his entering clerk; the judgment was entered "that he recover his debt and damages," and a blank was left in the judgment paper as to the sum to be inserted for damages. W. the entering clerk, died soon after, and the warrant of attorney and his papers were lost, but S. who was still living, made an affidavit of these facts. A motion was made by the plaintiff for leave to insert a certain sum damages and costs. The application was opposed by the defendant's counsel for the following reasons; 1st. Because nothing appeared on the judgment to amend by. 2d. That if any thing to amend by had appeared, yet the judgment could not be amended, because it was of another term, the judgment being now nineteen years old. 3d. That it could not be amended if it should be deemed a misprision of the clerk, for in common law such a misprision in process was not amendable in another term, and it is not warranted by stat. 8 H. 6. which extends to records as well as process. *Per Cur.* This would have been amendable, if the Court had any thing to amend it by. It is the act of the Court, yet judgment is not given by them as to damages. It might have been amended in the same term; for though it is entered on the roll, yet the Court has power to amend any fault in a record the same term wherein it is entered.

19. SALE v. CROMPTON, E. T. 1743, K. B. 1 Wils. 61; S. C. 2 Stra. 1209.

In the entry of judgment by nil dicit (upon a warrant of attorney) upon record, the defendant's name was mistaken, it being entered Compton instead of Crompton, and it was moved (twelve years after) upon producing the warrant of attorney, and showing the bill upon the file, to have the record amended thereby. It was insisted against the amendment, that what was prayed was rather that the court would make a new judgment against another person, than an amendment, for that here the record was of a perfect judgment, and no way erroneous against Compton, and that to alter this judgment to Crompton would be of the utmost ill consequences to purchasers; and further, that it was not in the power of the Court to grant what was prayed, at the distance of twelve years, for that in every general way judgment ought to be entered in the same term in which it is given, but supposing the Court would do it, yet they could not now amend the docket book under the statute 4 & 5 W. 3. and then it would be a judgment not doggetted, which could not affect a purchaser. And of this opinion was the Court, who discharged the rule, remarking, at the same time, that if they were to amend in this case, it would be going further than ever was gone before.

20. DOUBLEDAY v. ———, E. T. 1817, K. B. 2 Chit. Rep. 27.

A motion was made in an action on a judgment for a production of the record of the judgment, upon which it was insisted that there was a material variance between it and the declaration. A counter motion was made on the part of the plaintiff for leave to amend, on payment of costs, which was granted. See 7 T. R. 447; 1 Wils. 78; Tidd. 6th edit. 744; ante, p. 574.

21. BURROUGH v. STEPHENS AND ANOTHER, EXECUTORS OF ELTON, E. T. 1814, C. P. 1 Marsh. 211; 5 Taunt. 553. S. C.

The plaintiff had brought this action against the defendants as executors on a bond, given by their testator. The defendants pleaded a judgment recovered against them, but on being ruled to produce the record of the judgment

they made default, and judgment was signed against them on the 12th of May, 1803. The entry on the roll appeared to have been to the following effect: "That the plaintiff do recover against the defendant the debt and damages de bonis testatoria, et si non, the damages aforesaid de bonis propriis." The words "damages aforesaid" had been since inserted in an interlineation, which materially altered the effect of the record. A motion for a rule nisi was now made to amend the judgment roll, by striking out these words, and also to insert the name of one of the defendants in the misericordia at the end of the judgment, which was obtained. It was proved that the plaintiff's original attorney in the cause was dead, and the present state of the record could not be accounted for. *Per Cur.* As to whether the fact of executors pleading a plea which is false within their own knowledge, personally bind them, we give no direct opinion. It is a difficult question to distinguish between what is or is not such a plea. It being at all events discretionary, whether we will grant this application, we think it would be improper in us to interfere after so long a period has elapsed.—Rule discharged as to the interlineation, and made absolute as to the insertion of the christian name, to which there was no opposition. See 1 Saund.* 336, a. b; 1 T. R. 782; 3 id. 349; 1 Burr. 316; 5 id. 2730; 2 Lev. 21.

22. *PRINCE v. NICHOLSON*, H. T. 1815, C. P. 6 Taunt. 45; 1 Marsh. 401, S. C.

Judgment had been given for the defendant as executor on demurrer to a plea of puis darrien continuance in a prior term. A motion was now made to permit the plaintiff to withdraw his demurrer, and to take judgment of assets quando acciderint. *Per Cur.* No case has been cited to warrant this amendment. Judgment was given in favour of the defendant as executor in a previous term, and the defendant now comes forward, after the lapse of two terms, to reverse it, when, perhaps, the defendant's reliance on the judgment may have materially affected his disposition of the assets, with reference to the rights of third persons.—Rule refused. See 4 Burr. 1498.

would not allow an amendment by setting aside the judgment and permitting plaintiff to reply after the lapse of 2 terms. The judgment may be amended by the verdict; and after a rule to show cause, the record was amended.

23. *SMITH v. FULLER*, M. T. 1727, K. B. 2 Stra. 787.

Error on a judgment in C. P. in case of slander. Upon not guilty pleaded the jury found for the plaintiff as to one set of words, and for the defendant as to all the rest, and judgment for the plaintiff. The Court thought the judgment not sustainable; but on the importunity of the defendant in error, who had applied to C. B. and had moved in this Court to amend the record by the verdict, and after a rule to show cause, the record was amended.

24. *PARSONS v. GILL*, M. T. 1702, K. B. 1 Salk. 50; S. C. 2 Ld. Raym. 895. Or by the

In debt upon a mutuatus, the judgment was entered up as of H. T. 1700, whereas the borrowing appeared to be the 2d of April, 1701. Error being brought to reverse the judgment, a motion was made to amend the judgment by the paper book, signed by the master, which was the 2d of January, 1700. *Per Cur.* This ought to be amended, for it is but a slip of the clerk, who should have perused the paper book signed by the master; that document is enough to amend by.

25. *LE NOYER'S CASE*, M. T. 1701, K. B. 7 Mod. 102.

In an inferior court the record stated that the process "commanded," instead of "he is commanded;" but as the draft of counsel delivered to the clerk to enter up judgment was drawn correctly, the Court was moved for leave to amend the record by it. *Sed per Cur.* There never was an instance of an amendment by the draft of counsel, because it is a document of no authority, alterable at pleasure, and to change it is no offence; the case stated of a bond

* If an executor plead a plea, the falsehood of which lies within his own knowledge, and which if true would be a perpetual bar to the action, he renders himself personally chargeable to the plaintiff's demand, as if he plead *ne unguis executor* (1 Roll. Ab. 930, 933.) or plead a release made to himself (1 Cro. Car. 671, 672.) and it is found against him, the judgment shall be de bonis testatoris et si non de bonis propriis. Vide Com. Dig. Administrator, L. 3; 3 Bac. Ab. 77, 87; 11 Vin. Ab. 383; Toller's Law of Executors, 4th ed. 462; sed vide 1 Ves. 212; where Lord Hardwicke is reported to have said, that notwithstanding the falsity of such pleas, the executor would not be chargeable in his personal capacity, being only responsible for such as comes to his hand.

propria; and interlineation is afterwards made, by which the judgment de bonis propriis is confined to the damages only, the Court will not strike out the interlineation after a lapse of 6 years, if it does not appear by whom the alteration has been made.

[577] Where judgment had been given for defendant on demurrer to a plea as executor, the Court would not allow an amendment by setting aside the judgment and permitting plaintiff to reply after the lapse of 2 terms. The judgment may be amended by the verdict; and after a rule to show cause, the record was amended.

But the draft of counsel is not of sufficient authority to empower the Court to amend a record.

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To debt on is quite different, for a bond is an authentic document, and making an alteration therein is forgery.

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(b) *After a writ of error.*

1. ELLISON v. ELLISON, M. T. 1660, K. B. T. Raym. 38.
In debt on bond against an executor, the defendant pleaded that it was not the testator's deed, and verdict for plaintiff, and judgment *quod defendens capiat*, where it ought to have been in *miser cordia*, because it is a denial of the deed of his testator. The defendant brought a writ of error, and a motion was made to have it amended; but *Per Cur.* It cannot be amended in another instead other term.

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2. HODGES v. HODGES, M. T. 1660, K. B. T. Raym. 51.

On error from the Common Pleas the error assigned was, that no pledges had been inserted. This defect, it was contended, was amendable, or at least aided by the 18 Eliz. c. 13. In the latter opinion Wyndham, J. acquiesced; but Foster and Twisden, Justices, directed the amendment. See 4 Ann. c. 16, s. 1; 1 Wils. 226; 2 id. 142; 1 Chit. Pl. 403.

But pledges
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series;
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quod, &c.

3. POOLE v. LONGUEVILL, H. T. 1667, K. B. 2 Saund. 223; S. C. 2 Keb. 660.

Upon error from the Common Pleas, in which the defendant had obtained judgment, it was moved that there was an error in the judgment; the words "therefore it is considered that the said Poole take nothing by his writ, but be in mercy for his false claim, and the said Longueville, A. M. W. R. and T. L. (the defendants) go thereof without day," were wholly omitted out of the record. The amendment was afterwards made, and judgment affirmed.

4. MEREDITH'S CASE, E. T. 1671, K. B. 1 Vent. 217.

Error on a judgment from the King's Bench, in Ireland, where Robert Meredith was plaintiff, and judgment was entered *quod prædict' Carolus Meredith recuperet.* But *Per Cur.* It is amendable, being the fault of the clerk in the name, which was right in the other parts of the record; the whole of the record was before him, and he should have been guided by it.

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5. HODGES v. NICHOLAS, M. T. 1685, K. B. 2 Show. 493.

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After judgment by default, writ of inquiry, judgment, and writ of error brought, a motion was made for leave to amend an omission in the return of the writ of inquiry, viz. *virtute brevit' et per sacramentum.* This return was correct; but in making up the record the clerk had omitted those words; and it was argued, that though the omission be in the most material thing, yet it ought to be amended; the clerk having a good record to guide him, and he having mistaken it, it is but the clerk's omission, and amendable, the writ of inquiry upon the file being right. It was opposed, on the ground of it being a matter of substance, and not of form. But *Per Cur.* It is only a mistake of the clerk; though it be material, yet it is amendable, and without costs.

6. PITT v. DOCKWRA, H. T. 1686, K. B. 2 Show. 508.

Upon a writ of error brought in the Exchequer Chamber in debt on bond, in which the plaintiff had obtained judgment, it was insisted that the roll was of E. T. in the 1st of James 2. The memorandum of a bill coram Carolo nuper rege, which declared on a bond, dated the fifth day of November, in the 36th year dict' Caroli, and imparlance is to Easter term ante quem diem dictus Carolus obiit; so that it appeared to be a declaration of Hilary term, in the 36th year, &c. nuper regis, of a fact done tempore nuper regis. On a motion to the Court of King's Bench to amend the record that was there, in order to have the transcript amended in the Exchequer Chamber, the Court ordered the amendment.

7. SMITH v. FULLER, M. T. 1696, C. P. 1 Lord Raym. 116.
In trover; the plaintiff declared that the goods came to the hands of all the defendants, but in the part alleging the conversion the name of one of them was omitted. The defendants pleaded distinctly by name; and evidence, tending to charge them jointly, was given at the trial. Verdict and judgment for the plaintiff against all. Upon error brought in the King's Bench, the omission of the name of one of the defendants in the conversion

was assigned for error. The plaintiff moved in the Court of Common Pleas one of several defendants; for leave to amend. *Per Cur.* It appears that it was but *rectum clerica*; evidence was given against all of them collectively, and a joint verdict obtained against them; therefore the amendment must be ordered, upon payment of costs.

8. DEACON v. VIVIAN. E. T. 1735. C. P. Barnes. 7.

A judgment by *non inform* was signed Dec. 22, on a warrant of attorney, Or the judgment dated October 31, in Michaelmas term. A writ of error was afterwards brought, and the plaintiff's attorney moved to amend the record according to the fact, by inserting at the top of the roll, "from the day of St. Martin, in fifteen days, in Michaelmas term, in the 9th year," &c. in order to prevent the judgment from having relation to the ensign day of the first return. —Amendment ordered.

9. BLAKEY v. BIRMINGHAM. E. T. 1739. K. B. 2 Stra. 1132.

After error brought, the court amended a judgment, which run, that the plaintiff "should recover" instead of "do recover," it being the misprision of the clerk.

10. SLICER v. THOMPSON. T. T. 1751. K. B. 2 Stra. 1156.

On error brought here on a judgment in Ireland, which run that the plaintiff shall recover, the Court amended it to "do recover," on the authority of the preceding case of Blakey v. Birmingham.

11. DICKINSON v. PLAISTED. H. T. 1798. K. B. 7 T. R. 474.

On a writ of error on a judgment given for the plaintiff, assigning for cause that the bill was filed before the cause of action accrued, it appeared that the plaintiff had, without the consent of the Court, or without the permission of the defendant, procured the roll to be amended. The defendant considering this mode of proceeding to be irregular, obtained a rule to show cause why the roll should not be amended in the usual course. *Per Cur.* The amendment by the plaintiff without the permission of the Court was highly indecorous, and ought to be severely censured, in order to prevent the recurrence of such a practice. We can never suffer any record to be altered without our express order, though had the plaintiff applied to the Court, we should have granted the rule for the amendment; consequently this rule must be made absolute. See 2 Stra. 1271; S. C. 1 Wils. 171; 1 East. 1 M. & S. 232.

12. MOODY v. STRACEY. T. T. 1812. C. P. 4 Taunt. 538.

A motion was made to amend the declaration, by inserting the letter "t" in the defendant's name, pending a writ of error which had been brought on account of the omission. *Per Cur.* Let the rule be made absolute, upon payment of the costs of the motion for the amendment, and of the writ of error. See 4 Burr. 2527.

13. HILLERDON v. SKILDROY. H. T. 1742. K. B. 2 Stra. 1182.

After error brought in the Exchequer Chamber, the judgment was amended by adding the introductory words to the award of a writ of inquiry, viz. that the plaintiff ought to recover his damages against the defendant.

14. FRENCH v. COOK. H. T. 1808. Exchequer Chamber. 1 Taunt. 126.

The plaintiff in this case assigned for special error "that there was no bill filed against the parties to warrant the declaration and judgment," and obtained a certiorari, the return to which stated that "it did not appear that any bill was filed of record of Michaelmas term between the parties." The defendant joined in demurrer, and averred "that there was a bill filed between the parties aforesaid in the record aforesaid as of Michaelmas term, to warrant the declaration and judgment aforesaid," and obtained a certiorari, which alleged "that a bill was filed of record in the plea within mentioned, as of the aforesaid Michaelmas term." *Per Cur.* There never is an original, and there is no reason why a bill should not be filed after judgment as well as an original. If there is a bill on the file of that term, the Court will not inquire how it came there.—Judgment affirmed. See 5 T. R. 173. 325; 2 H. Bl. 608.

But in debt by an executor the words *et proferit hic in Cur' literas testamentarias* cannot be amended after error brought; Or if the judgment & verdict be for greater damages than what are laid in the declaration a remittitur cannot be entered, nor can the judgment be amended;

15. *YOUNG v. CAGE*. E. T. 1672. K. B. T. Raym. 923.

In debt on bond, judgment by default for the plaintiff, as executor, but the plaintiff's attorney had omitted the words *et proferit hic in Cur' literas testamentarias*, though the plaintiff was described as executor in the declaration. Upon writ of error brought, a motion was made to amend the record by inserting these words; but—The Court refused the amendment, because, whether the plaintiff was executor or not, was matter of fact, and there was no reason for believing it to be true, without any proof but the plaintiff's own suggestion.

16. *RAY, ADMINISTRATOR, v. LISTER*. E. T. 1738. And. 381.

In debt upon two judgments, one of which was for 30*l.* and the other for 10*l.* and the damage was laid to be 10*l.* only; the defendant pleaded payment, and the jury found for the plaintiff, and gave 30*l.* damages; and the judgment was given as of last Michaelmas term accordingly; and after error brought, and the record transcribed, it was prayed that the record might be amended by inserting 30*l.* instead of 10*l.* which was laid as damages; but this being refused, it was moved the same term that leave might be given to the plaintiff to enter a *remittitur* on the judgment roll of 20*l.* damages, in order to make it agreeable to the declaration. It was admitted on the part of the plaintiff, that on the defendant's waiving his writ of error, the plaintiff should pay the costs of the writ, because then it must be supposed that the same was brought on account of this mistake; but if this be refused, then, it was urged, the plaintiff ought not to pay the costs thereof, because in such case the writ must be taken to be brought for other defects. *Per Cur.* The Court may amend judgments of a preceding term where they are erroneously by the misprision of the clerk, and the amendment is warranted by some of the antecedent proceedings, and also in instances noticed in, or similar to, such as are mentioned in the statute of Car. 2. and under one of these considerations all the cases cited for the motion will fall. But this the Court has no power to do, either where the judgment is given pursuant to the verdict (as it ought to be, unless the plaintiff himself enters a *remittitur* before judgment, which in some cases he may do,) and consequently it is perfect and complete, or where the judgment is erroneous, by the act of the Court in point of law; the foundation, therefore, upon which the argument in support of the motion is built wholly fails. As to entering the *remittitur*, if this be now done, it will make the judgment erroneous.

17. *MARRIOT v. LISTER*. M. T. 1762. C. P. 2 Wils. 147.

Or to change the nature of the demand recovered by the verdict; [582] A writ of error having been brought upon a judgment recovered against the defendant for money lent and advanced by the plaintiff to a third person, at the defendant's request, it appeared by the original writ that the count was for money paid; it was consequently moved that the count might be amended by the writ, by striking out the word "lent," and inserting the word "paid," instead; but—The Court said, we must presume that the plaintiff proved money lent, for the verdict is for money lent to a third person, and no prececent can be shown where such an amendment as this was ever made. The statutes of amendment lead us to see what power we had at common law to amend, and we had no power to amend after the first term where the record was made up, and the roll carried in; but since the statute courts have gone a great way further; yet there is no statute which goes so far as to empower us to make an amendment which would alter the trial of the issue. The question at the trial was, whether the plaintiff lent a third person money at the defendant's request; and you would now make the issue to be, whether the plaintiff paid a third person money at the defendant's request. This would be to alter and change the record in a most substantial point; we are bound by the record and the verdict, and must take it to be true that every part of the declaration was proved at the trial. The plaintiff has mistaken his action; but if we were to allow this amendment, great inconvenience would ensue, for then we should lay down a rule that whenever the plaintiff had obtained a verdict in a case where he had no legal cause of action, he might afterwards sue out an original writ, wherein he had good and legal cause of action, and amend his record thereby, and so recover upon an issue which had never been tried.—Amendment refused.

Though if judgment in replevin is erroneous and cannot be amended so as to be entered up under the statute, the Court will suffer the defend

18. *ROSS v. MORGAN*, T. T. 1789, K. B. 3 T. R. 349.

On error in replevin from the court of general sessions in Glamorgan, it appeared that the jury had found a verdict for the avowant, and damages to the amount of the rent claimed in the avowry, but had not found either the amount of the rent in arrear or the value of the distress. Judgment was entered for the damages assessed. *Per Cur.* This judgment is erroneous, and cannot be amended under the statute, because the neglect of such inquiry by the jury cannot be in any manner supplied. The Court, however, permitted the defendant to amend his judgment by entering a common law judgment.

19. *DUNBAR v. HITCHCOCK*, M. T. 1814, C. P. 1 Marsh. 382; 5 Taunt. 820. S. C.

The defendant, in an action of trespass brought in C. P. for an aggression committed under the mutiny act (52 Geo. 3. c. 22.) had obtained a verdict, and the judge had certified that he allowed the defendant treble costs. Judgment was entered by the clerk of the judgments for treble costs, as if it were the act of the Court, without stating that they were recovered under the statute. A writ of error was brought on this ground; after which a rule nisi was obtained to strike out the word "treble," leaving it a judgment for costs generally. *Per Cur.* In the case of a common judgment, where the defendant succeeds in his action, the form is, "that the defendant do recover against the plaintiffs a certain sum for his costs by him sustained in and about the defending the action." But where double or treble costs are given by act of parliament, they are supposed to be more than what the defendant has incurred by defending the action. Hence they ought not to be stated in the common form, but something ought to be added to authorise their recovery. No precedent has been cited of a judgment entered in blank, where treble costs have been taxed, as in this case. This cannot be therefore considered as a misprision of the clerk. It is a substantial defect; and we cannot make the rule absolute.—Rule discharged. See 1 T. R. 783; 7 id. 448; 1 Taunt. 210; 1 Marsh. 180. n. b.; 1 Burr. 316; 9 Wentw. 771; Tidd's Forms. 2d ed. c. 39. § 75.

20. *DUNBAR v. HITCHCOCK*, H. T. 1815, K. B. 3 M. & S. 591.

A writ of error had been brought in this court upon the preceding case, assigning for error that it did not appear why the defendant should recover the said sum for his treble costs, &c. according to the form of the statute in that case made and provided. The judgment of the Court of Common Pleas had been affirmed. In the entry of the judgment in this court, the assignment of errors and joinder had been entered upon the roll as of Monday next after the morrow of the Purification, in Michaelmas term. A writ of error had been afterwards brought in parliament, and the errors assigned were the omission of the certificate in the judgment of the court of C. P. and the entry of the assignment of errors and joinder in the judgment of affirmance in this court, as of the day above stated, there being no such day. A rule nisi was now obtained to amend these errors. *Per Cur.* The cases of *Shoot v. Coffin*, 5 Burr. 2730. and *Petrie v. Hanway*, 3 T. R. 659. authorize the Court to grant these amendments. The amendment prayed is only to correct a misprision of the clerks in entering certain facts upon the roll, which is warranted by the authority of precedents, and by the reason of the thing as well as the statutes. Upon this amendment being certified in the House of Lords, they will probably direct the transcript to be amended.—Rule absolute. See 8 Rep. 156. 262. b; 14 Edw. 3 st. 1 c. 6; 8 Hen. 6. c. 12; 16 & 17 Car. 2. c. 8.

21. *PATERSON v. EVERARD*, M. T. 1815, K. B. 2 Chit. Rep. 30.

The defendant's plea in this action was framed as an answer to the whole declaration; but in fact it only answered the first count. After judgment for plaintiff, error was assigned on this ground in the Exchequer Chamber; a rule nisi had been obtained to amend the roll by permitting the plaintiff to take judgment by *nil dicit* to the count unanswered. *Per Cur.* Judgment must have been taken for the part unanswered, or the action would have been discontinued. The amendment prayed is unnecessary and useless. Let the rule be

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laration was only an answer to part after a verdict and judgment for plaintiff, and writ of error brought; an amendment of the record by inserting judgment by *nil dicit* to the part unanswered was refused as being unnecessary. **22. EVERARD v. PATERSON**, E. T. 1816, Exchequer Chamber, 6 Taunt. 645;

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2 Marsh. 304. S. C.

Upon a writ of error being brought upon the preceding case, it was contended that the action was discontinued, and that the plaintiff could not maintain his judgment on the ground of the defect in the plea. *Sed per Cur.* The plea purported to answer the whole scope of the action, though the matter pleaded was no answer to one half of the declaration, and the plaintiff might have taken advantage of the deficiency of the plea; but the action was not discontinued by the omission to demur, and hence these circumstances are no ground of error. Judgment may therefore be reversed as to the count which was left unanswered, and as to the award of damages and costs, because being given generally they apply to the whole declaration; but there is no reason why we should totally reverse the judgment.—Judgment reversed as to part. See 1 Str. 303; 1 Wm. Saund. 28. n. 3; 1 Ld. Raym. 716; 1 B. & P. 411.

23. **SAUNDERS v. LENOIR**, M. T. 1701, K. B. 3 Salk. 32.

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On a writ of error on a judgment in the court at N. the record removed was commanded instead of is commanded, and messes, instead of misis; the draft in the court below was correct, and settled by counsel. On a motion to amend the record by the draft which the clerk made oath was right below, it was denied, because it was considered as no more than a private paper in their own custody, of which the Court could not take notice; and if the error had been committed by contrivance, as alleged, the defendant might bring his action. See Ca. Temp. Hard. 205.

24. **ANON.** H. T. 1667, K. B. 1 Salk. 49.

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ed by that
in the C.P.

The clerk of the treasury of the C. P. attended with the record, and it was moved that the transcript in the K. B. might be amended by it. Per Holt, C. J. This mode of amending the record here by the record of the C. P. is the practice of the Court, and only to save a *certiorari*; for if the record be right below, on diminution alleged, the party may have a *certiorari* of common right.

25. **TITE v. THE BISHOP OF WORCESTER**, M. T. 1695, K. B. 1 Ld. Raym. 94.

No costs
are payable
on amend
ing clerical
errors.

After a rule for judgment for the plaintiff, and before entry of it, the defendant brought a writ of error; afterwards, on the entry of the judgment, the clerk made an error by mistake, and leave was given to the plaintiff to amend, without payment of costs. See *Ridge v. Irton*, Sayre, on Costs.

(Q) OF THE SCIRE FACIAS AND PROCEEDINGS THEREON.

The Court
permitted
*recupera
tio* to be a
mended for
recognitio,
after a de
murrer to a
scire facias.

1. **AYRES v. HUNTINGTON**, M. T. 1687, C. P. 3 Mod. 251.

A *scire facias* was brought upon a recognizance of 1000*l.* to show cause why the plaintiff should not have execution *de præditiis mille libris recognitiis juxta formam recuperationis*, where it should have been *recognitiis præditiis*; and upon a demurrer it was held, that the words *juxta formam recuperationis* were surplusage; the record was amended, and a rule made that the defendant should plead over. See *Stra.* 1220; 1 Wils. 98; Barnes, 6; 8 Mod. 313; 10 id. 112; 11 id. 139; Comp. 107; Doug. 115; 1 T. R. 182.

2. **CHAMBERS v. MOLE**, M. T. 1694, C. P. 3 Lev. 430.

[585]
Or by inser
ting contin
uances;

A *scire facias* on a judgment was obtained, E. T. 27 Car. 2; and the *scire facias* bore date 25th April, 6 W. & M. returnable T. T. 6 W. & M. and upon the record the entry is T. T. 7 W. 3. but no continuances were entered from T. T. 6. until T. T. 7. The defendant then pleaded a frivolous plea, to which the plaintiff demurred; and for the defendant it was contended that the whole plea was discontinued for want of the continuances, from T. T. 6. until T. T. 7 W. 3. But *Per Cur.* The plea roll itself is amendable without any imparlance roll, for the continuances, essoigns, &c. are the acts of the Court itself; and the Court may at common law, at any time before judgment, amend their own acts; but judgments cannot be amended in

another term, but only in the same term, by the common law. See Cro. Jac. 212; 4 E. 3, 9, b; 5 E. 3, 25; 1 Lev. 150; 1 Roll. Abr. 201; 1 Sid. 66; Raym. 440; Mod. 164; 1 Salk. 51; 1 Keb. 191.

3. TULLEY V. THE BAIL OF VAVASOR, M. T. 1706, K. B. 11 Mod. 139.

On a motion to amend a *scire facias* against bail on a writ of error brought on a judgment in C. P. the writ stated that Randal had recovered against James, instead of alleging that James had recovered against Randal, which was contended to be a variance from the record. On the other side it was insisted, that it was only a mistake of the clerk, in not pursuing his instructions, and that such a mistake might be amended after a writ of error.

Per Cur. We are clearly of opinion that the writ of *scire facias* in this case is amendable. See 2 Vent. 104, 195; 3 Wils. 49; Barnes, 3; 3 Lev. 36.

4. PIPER V. THOMPSON, T. T. 1726, Exch. 1 Com. 418; S. C. Bunb. 228.

A *scire facias* upon a recognizance of the bail after judgment was entered in the manner following, viz. whereas, Thomas Piper lately, that is to say, in Michaelmas term last past, recovered against — as well a certain debt upon bond, as also a sum of — shillings for his costs, &c. in hac parte, &c. Upon this there was a demurrer; and it was shown for cause that the defendant in the judgment ought not to be condemned for cost in hac parte, but it should have been in ea parte, &c. But *Per Cur.* There needs no amendment in this case; for though in ea parte seems proper by way of recital, yet when it is said in hac parte that suffices; for it has relation to the judgment mentioned in the writ of *scire facias*, and therefore it might be well said that the plaintiff recovered his debt by the judgment, and also his costs appointed in the judgment here mentioned, and there are precedents both ways.

5. SWEETLAND V. BEEZLEY AND BROWNE, H. T. 1773, C. P. Barnes, 4.

A *scire facias* against bail, &c.; all the proceedings thereupon were ordered to be amended by the record in the original action, by inserting the word "mercant," instead of "mercier," being the defendant's proper addition, after issue joined upon nul tiel record.

6. STEPHENS V. THE BAIL OF HUDSON, E. T. 1701, K. B. 2 Ld. Raym. 1137.

On a *scire facias* against bail, the defendant pleaded payment of the money by the principal, &c. The plaintiff replied non solvit, &c. and concluded to the country, issue being joined without striking out the words, "and the defendant doth so likewise." The defendant demurred, and the paper book was made up, and the record was of a preceding term; the plaintiff, in the following term, moved for leave to strike out the words, "and the aforesaid does so likewise." *Per Cur.* This is a matter of course for the party that takes the issue to join issue for the other, on a supposition that they would do it to maintain the fact they have alleged; and therefore, if they will not join in the issue, but will demur, they ought to strike it out, and leaving it in is a mere subterfuge. —Leave granted.

7. VILLARS V. PARRY AND ANOTHER, E. T. 1697, C. P. 1 Lord Raym. 182; S. C. Comb. 397.

The defendants were bail for one Clerk in a suit brought by the plaintiff's testator, and were bound in a recognizance jointly and severally for 200*l.* Judgment was given against Clerk, who brought a writ of error in K. B. and the judgment was affirmed. Upon which the plaintiff's testator sued a *scire facias* upon the recognizance against the bail, who pleaded that no capias ad satisfaciendum had issued against Clerk; the plaintiff replied that there was a capias ad satisfaciendum sued and returned, &c. and therefore prayed judgment to have execution of the several sums mentioned in the recognizance against the defendants. The defendants demurred, and judgment was given for the plaintiff, and entered that the plaintiff should have execution de prædictis separatibus summis 200*l.* et 200*l.* against the defendants jointly, whereas the *scire facias* was several. On a motion that this might be amended, because the *scire facias* was right, and that ought to govern all the proceedings; *Per Cur.* If this had been a joint lien, the judgment must have been joint; but here the plaintiff by his several *scire facias* has made it a several lien, and therefore

Or Randal, for James;

Or if the record be recited in hac parte, instead of in ea parte, [583]

Or a misnomer is amendable;

Or by striking out the words prædicti defendantis similiter.

But a joint judgment against bail upon a several *scire facias* is not, after the term in which it is entered amendable.

- [537] the judgment ought to be several. It is a plain error in law, and not amendable; but if it had been John for Thomas, this had been only vitium clerici, and amendable. Or if this motion had been made the same term in which the judgment had been given, it might have been amended, because the judgment in the eye of the law is, during the whole of the term in which it is pronounced, in the breast of the Court.

The record is amended by a *sci re facias*. Semb. That a *sci re facias* against bail in error may be amended by the record of the recognizance. So writs of *sci re facias* as issued upon a judgment and declaration thereon were ordered to be amended conformably to the judgment roll. But the Court refused to amend the teste of a writ of *sci re facias* against bail. So an amendment of a declaration in *sci re facias* against bail who had omitted to surrender their principal at the proper time was refused.

8. HAMSON v. CHAMBERLIN, M. T. 1732, C. P. Ca. Prac. 76.

On motion for leave to amend the record of an issue *nul tiel record*, by the writ of *sci re facias*, the Court were of opinion that it might be amended by the *sci re facias*.

9. PERKINS v. PETIT, T. T. 1800, C. P. 2 B. & P. 275.

A rule nisi had been obtained to amend a *sci re facias* against the bail in error by the record of the recognizance, by inserting the costs of the verdict which had been in the former omitted. *Per Cur.* It does not appear to be the modern practice to permit amendments in cases of this kind. As the bail ought not to be taken by surprise, we will discharge the rule; at the same time we desire that our refusal to amend may not be drawn into precedent.—Rule discharged.

10. BRASWELL v. TICO, H. T. 1808, K. B. 9 East, 315.

A rule was obtained to show cause why two writs of *sci re facias* and the declaration thereon should not be amended, by stating the judgment and proceedings (in respect of which the writs had been obtained) to have been against the defendant as a common person, and not as an attorney, conformably to the judgment roll.—Rule absolute. *Note.* In drawing up this rule the judgment was improperly stated to be signed "in this cause;" but as no judgment had been signed in the cause now before the Court, these words were rejected as surplusage.

11. FULWOOD v. ANNIS, H. T. 1803, C. P. 3 B. & P. 321.

A rule had been obtained in this case to show cause why the teste of a writ of *sci re facias* against bail should not be amended. There were fifteen days between the teste and return, but the former bore date before the *capias ad satisfaciendum*. *Per Cur.* The Court, in the exercise of their discretion, will not aid any irregularity of which the bail might be fairly entitled to avail themselves.—Rule discharged. See Barnes, 26, 27; 2 Stra. 1165; 1 Bing. 206; 1 Taunt. 223; 2 Saund. 72, n.

12. STEVENSON v. GRANT AND ANOTHER, H. T. 1806, C. P. 2 N. R. 103.

This action had been commenced against the bail; but in consequence of the defendant demurring to the plaintiff's declaration in *sci re facias*, he had obtained an order from a judge to amend in the several particulars stated in their demurrer. A rule nisi was now obtained by the defendants to discharge the order. It appeared that the principal was in custody, charged in execution in other actions, but that the defendants (the bail) had omitted to surrender him in this action until after they were fixed, but that they had since done so.

Per Cur. The plaintiff might have charged the principal in execution, but in consequence of an omission to surrender him, he proceeded against the bail. In such a case no sufficient reason can be suggested to induce us to allow the amendment. The rule must be made absolute.—Rule absolute. See Barnes,

3, 4; Ca. Prac. 76; 1 Salk. 52; 1 Id. Raym. 182, 596; 2 id. 1057; 1 Salk. 461; 2 id. 915, 1165; 3 Wils. 154.

(R) OF WRITS OF ERROR, AND PROCEEDINGS THEREON.

1. THOMKIN v. CROCKER, E. T. 1608, K. B. 1 Id. Raym. 564; S. C. Carth. 520; S. C. 1 Salk. 49; Holt. 452; S. C. 2 Lutw. 1211; S. C. Man. Ap. 67; WALKER v. STARKOE, S. P. K. B. 5 Mod. 69; 1 Lord Raym. 71; Comb. 354; Carth. 367. S. P. ELKINS v. PAINE, T. T. 1728, 1 Lord Raym. 1532.

The cursitor had made out a writ of error contrary to his instructions; he

* But now by stat. 5 Geo. 1, c. 13. all writ of error wherein there shall be any variance from the original record, or other defect, may and shall be amended and made agreeable to such record by the respective courts where such writs of error shall be made returnable.

[588]
Formerly no amendment was allowed in a writ of error, altho' the defect originated with the cursitor.*

deposed that the instructions were correct, and that the mistake had originated with him. Application was made for a rule nisi to amend, on the authority of Blackmore's case, 8 Co. 156; Sed per Holt, C. J. The design of all writs of error is to destroy the judgment. No precedent can be shown where a writ of error has been amended, which is a great argument that it cannot be done; and it is contrary to the stat. 8 Hen. 6, which was to support original judgments, and avoid writs of error, which tend rather to the reversal of judgments. Let the rule be discharged. See 1 Salk. 49.

2. MALLETT V. STUKELEY, M. T. 1678, K. B. 2 Show. 83.

This was a motion after a writ of error to amend a mistake in the return day as *proxime post*, when it should have been in *crastinum*; and also the omission of *ricecomili*, and the award of the writ of inquiry was *ideo præceptum est*. And the Court permitted the amendment. See Lord Raym, 94; Sira 11, 1227; 3 Lev. 331; 1 Cowp. 407; Jones, 9; Poph. 102; Salk. 162; 1 T. R. 783.

3. DIGHTON V. GRANVILL, M. T. 1692, K. B. 4 Mod. 247; S. C. 2 Vent. 321; S. C. Carth. 158.

Judgment had been obtained in the reign of King James II. in an action commenced in the preceding reign; debt was brought on the judgment; and after a writ of error allowed, which recites the judgment "as in our court, &c." although the judgment and continuances were in King James' reign; the writ of error supposing all the proceedings to have been had in the time of the then king, which being inconsistent with the real fact, the plaintiff's counsel insisted that the writ was amendable by stat. 8 H. 6. especially since the word *loquela* might extend to the whole. The Court ordered the amendment.

4. GUY V. NICHOLS, T. T. 1696, K. B. Comb. 265.

This was a motion to amend upon a writ of error, directed to the mayor, recorder, and aldermen *burgi de Kirbykendal*; the return was *respons. A. mayor, B. recorder, and C. and D. sen. aldermen, not saying burgi præd.* But the Court held it amendable.

5. THE SWORD BLADE COMPANY V. DEMPSEY, H. T. 1730, K. B. 2 Stra. 891.

An ejectment was brought against the above company and E. After a verdict for the plaintiff, E. died, and a writ of error was brought, laying the judgment to be to the great damage of the company and of Mary E. the daughter and heir of E.; Mary E. and the company jointly assigned errors.

On motion to amend the writ and assignment by striking out Mary E's name the Court were of opinion that it was amendable by statute 5 Geo. 1, c. 13. not only as a variance from the original record, which is really no way to the damage of M. E. but also by virtue of the general words other defect.

6. VERELST V. RAFAEL, E. T. 1776, K. B. Cowp. 425.

In an action of trespass and false imprisonment against two persons jointly, judgment was given against one of them, the other being found not guilty. Afterwards a writ of error was brought in the names of both defendants, on affidavit made by the officer, who swore that it was his mistake, and that the instructions left with him were to make out a writ of error in the name of the other defendant only; *Per Cur.* The reason why the writ did not agree with the record originated in a mistake of the officer, who swore that it was his mistake, and that the instructions left with him were to make out a writ of error both, the in the name of the other defendant only; *Per Cur.* The reason why the writ did not agree with the record originated in a mistake of the officer, who swears that the error was made by him. The words of the statute 5 Geo. 1, c. 13, are "that all writs of error wherein there shall be any variance from the original record, or other defect, shall be amendable;" now here is a defect, and that defect owing to the mistake of the officer; the words of the act are general, "other defects;" and if there were any doubt, the privilege ought to be extended as far as possible, because it is for the furtherance of justice.—Rule absolute on payment of costs.

7. MEDLEY V. STOKES, M. T. 1736, K. B. Ca. Temp. Hard. 321.

On a motion by the plaintiff in error to quash a *scire facias quare executio-*

An amendment has been made after a writ of error allowed in the day of the return, as making it on the morrow of instead of next after. So where debt was brought up on a judgment obtained in the reign of a former king, and a writ of error allowed which was *loque les que suit in curia nostra* the Court allowed it to be amended.

[589] Or the return of a writ of error is amendable; Or by striking out the name of a supposed joint plaintiff. And in trespass against 2 jointly, judgment against one of them on error being found not guilty, on error brought in the names of both, the Court gave leave to amend; Or if the summons part of a *scire facias quare executionem non* be not on oath, it may be amended.

nem non, &c. *nilil* returned, the command of the writ was, that he have here this writ and the names of those by whose oath he has summoned." It was objected that this was incorrect, as the summonses were not on oath. For the defendant in error it was contended that the word oath might be rejected as surplusage, or at least that it was amendable. Per Lord Hardwicke, C. J. [590] These writs of *scire facias* are considered as process to bring in the party to assign errors; and for that reason, if he comes in on it, he can take no advantage of any mistake in the writ, it being considered only as a process to bring him in; but now the question is, whether, before he comes, he may not take advantage of a fault in the writ; and I think he may, for he cannot afterwards, for he shall be taken to have waived it as an appearance to other process; and this is a fault in the writ. The word "oath" cannot be rejected, because there will not be sufficient command in the writ then remaining: but, however, the Court is not in strict justice bound to quash it. On application an order to amend may be obtained.—Rule to amend granted. See 9 East, 315; 2 B. & P. 275; 3 id. 321.

And a mistake in the name of one of the parties has been amended. The court of K. B. amended a writ of error from C. P. by inserting "in a plea of covenant broken," instead of "in a plea of trespass on the case." Upon error assigned of misnomer of one of the plaintiffs below in the warrant of attorney, and also so because there had been no verdict & judgment entered upon issue joined on a plea of set-off, it was held that the first objection was immaterial, and the court allowed the transcript of the record to be amended in the second.

8. *BARNARD V. GUY*, H. T. 1805, K. B. 2 Smith, 259.

The defendant sued out a writ of error in due time to prevent the plaintiff from having execution; but in filling up the writ a mistake was made in the christian name of the plaintiff, and it appeared on a writ of error in the Exchequer Chamber as a cause of *John Barnard v. John Guy*. The plaintiff sued out execution, and the defendant paid the money into the hands of the sheriff. The defendant obtained a rule to show cause why the money paid into the hands of the sheriff should not be paid into court pending the above writ of error, in order that the defendant might have time to amend his writ of error, which he could not do until the return of the transcript in Exchequer Chamber. The Court enlarged the above rule, in order to allow time for the defendant to amend his writ of error.

9. *SAMPAYO V. PAYEA*, T. T. 1812, C. P. 5 Taunt. 23.

Judgment had been recovered by the plaintiff in an action of covenant in this court. A writ of error had been sued out by the defendant in a plea of trespass on the case. The plaintiff, observing the irregularity, treated the writ of error as no supersedeas, and sued out execution. A rule nisi had been obtained to set aside the execution, upon the ground that the writ of error operated as a supersedeas. Upon a subsequent day, it being stated that the Court of King's Bench had amended the mistake by inserting the words "in a plea of covenant broken," instead of "a plea of trespass on the case," the Court made the rule absolute to set aside the execution without costs, upon the terms that the defendant should bring no action of trespass.—Rule absolute. See *Yelv.* 211; 1 *Str.* 606; 2 id. 837; 2 *Salk.* 146; 2 *Ld. Raym.* 1403; 2 *T. R.* 737; 2 *Saund.* 38.

10. *DE TASTET V. RUEKER AND OTHERS*, In error, Exch. Chamber, 6 Moore, 135; 3 B. & B. 65: S. C.

Error was assigned in this case for a misnomer of one of the plaintiffs below in the warrant of attorney, and also for having omitted to make any entry of the verdict and judgment upon a plea of set-off. The counsel for the plaintiff applied for a rule to amend the transcript of the record as to the last error assigned, which was granted on payment of the cost of the day, and he was subsequently permitted to amend the *nisi prius* record and judgment roll in the court below. It was objected that the rule for amending the transcript should be discharged *quia improvide unanavit*, as the *postea* and judgment roll should have been amended in the court below, and brought here by a writ of certiorari in its amended state, before any alteration had been permitted. The Court, however, overruled this objection. The misnomer in the warrant of attorney was then insisted on as good ground of error. Per Cur. There is no weight in either objections. Let the judgment be therefore affirmed. See 1 *Roll. Ab. tit. Attorney*, II. 289; *Com. Dig. tit. Amendment*, E. 1; *Vin. Ab. tit. Misnomer*, A.; 32 *Hen. 8*, c. 30; 18 *Eliz. c. 14*; 3 *T. R.* 660; 8 *East*, 323; 10 *East*, 323; 11 *East*, 225; 1 *Marsh*, 477; 5 *Taunt.* 818.

11. CANNING v. WRIGHT. T. T. 1728. 2 Lord Raym. 1531.

A writ of error was brought by C. to reverse a judgment given against him in the C. P. The writ of error was tested 23d October, 12 Geo. 1. and made returnable in eight days of St. Martin, Michaelmas, 12 Geo. 1. and by the record certified the judgment appeared not to have been given till Hilary term following, 12 Geo. 1. The record was held clearly not to be well removed by the writ of error. The plaintiff in error then applied to have the writ amended by statute 5 Geo. 1. c. 13; but on reading the statute the Court entertained no doubt that it could not be done, for it would be to amend the writ contrary to the truth of the case, for the judgment in fact was not given till Hilary term, 12 Geo. 1. and hence this was not such a variance as was intended to be amended by that act.—Motion to amend denied. See 1 *Bar-nard*. 62. 63; 2 *Stra*. 834. 891; 2 *Ld. Raym*. 1179.

But a writ of error returnable before judgment signed is not amendable;

12. BUCKSOME v. HOSKIN. M. T. 1703. K. B. 6 Mod. 263; S. C. 2. 2 Lord Raym. 1057; S. C. 3; Salk. 32; S. C. 1 Salk. 52; S. C. Holt. 58; 762.

Or a variance in ejectment between the judgment and the *scire facias*.

A writ of error was brought on a judgment in ejectment in the Common Pleas, and the defendant in error sued out a *scire facias quare executionem non* to compel the plaintiff to assign his errors. There was a variance in the *scire facias* from the judgment, the latter being of two messuages, and the *scire facias* recited it to be but of one. The plaintiff in error, perceiving the variance, pleaded *nul tiel record* of the judgment, and the defendant moved that the *scire facias* might be amended, because it was a mistake of the clerk in varying from the record, which was his instructions. *Per Holt, C. J.* This is a good *scire facias* in itself, but it does not come up to your case. In 2 Vent. 49. the original was wrong, and holden not to be amendable. *Powel, J.* agreed; and that as it did not appear to them but there might be such a judgment as was recited in the *scire facias*; and for this reason the Court refused to amend it. See *Stra*. 401. 1165; 8 *Mod*. 313. 366.

[592] And where error had been assigned upon a mistake of the clerk of the Errors in transcribing the record, but which he had afterwards corrected in the transcript, the Court refused upon application by the plaintiff in error, to restore the transcript to its original state. And if the husband's name be omitted in a writ of error bro't by his wife an amendment will not be allowed unless there is an affidavit that the husband concurs. After writ of error in the Exch. Chamber, the amendment must be in the K. B. Upon amending a writ of error, new

13. RANDOLE v. BAILEY AND ANOTHER. In Error. H. T. 1813. K. B. 1 M. & S. 232.

The declaration in the court below was entitled specially. A writ of error was brought on the ground that the clerk of the Errors, in transcribing the record, had entitled it generally. The clerk of the Errors afterwards inserted the special memorandum in the transcript. A rule was now obtained to show cause why the transcript should not be again altered, by restoring it to the state in which it stood at the time when the plaintiff assigned his error. *Per Cur.* The clerk of the Errors, in transcribing the record, acted as the agent of the plaintiff in error. The mistake must be considered as the mistake of the plaintiff. The rule must be discharged. *Rule discharged.* See 7 *T. R.* 473.

14. BINNS AND WIFE v. PRATT AND ANOTHER. In Error. E. T. 1819. K. B. 1 Chit. Rep. 369.

A writ of error had been brought in this case by a *feme covert*, without joining her husband in the writ, and she and her husband assigned her coverture for error. A motion had been made for a rule to show cause why the writ of error should not be amended, and the husband's name introduced in the writ. *Per Cur.* As there is no affidavit that the husband concurred in the writ of error, we cannot give leave to amend. See 5 *Geo*. 1. c. 13; 2 *Stra*. 692; *Cowp*. 425; 2 *Saund*. 101. n. 1. a; 1 *Roll. Abr*. 748; *Sty. Rep*. 251. 208.; 1 *B. & A.* 586.

15. RUTTER v. REDSTONE. T. T. 1728. K. B. 2 *Stra*. 837. S. P. PARRY v. VILLARS. M. T. 1607. K. B. 12 Mod 303.

After error in the Exchequer Chamber, the transcript was brought back and amended in B. R. by the original record, which the Court held necessary to make the amendment here, as this differs from the case of a writ of error from C. B. because the C. P. sends up the record, and the K. B. sends only a transcript. See 2 *Stra*. 869.

16. RAFAEL v. VERELST. E. T. 1775. C. P. 2 Bl. Rep. 1067.

In trespass against V. and S. the latter had a verdict in his favor, and the former against him. The cursitor had instructions to sue out a writ of error for V. only. but by mistake sued out in the name of both. The Court, on mo-

bail must be put in to the amended writ in the court below.

[593]
A writ of error varying from the record is amendable without costs.

tion, gave leave to amend the writ, by striking out the name of S. But the recognizance of bail having necessarily followed the writ, the same mistake happened there, so that in fact there was no bail to the amended writ, whereupon the plaintiff below took out execution. Application was made to the Court to set aside this execution, and to restore the goods, which was ruled accordingly, upon the bail in error entering into a new recognizance in court.

17. GARDNER v. MERRETT. E. T. 1730. 2 Stra. 902; S. C. 2 Ld. Raym. 1587. There was a difference between the writ of error and the record; and as it stood in the paper, the Court observed it; but neither party would move to amend for fear of paying costs; on which the Court said the statute 5 Geo. 1. c. 13. would warrant them in amending it, which they did without costs.

18. GOULD v. COULTHURST. M. T. 1718. K. B. 1 Stra. 139. S. P. ALAND v. MASON. H. T. 1729. K. B. 2 Stra. 865.

But the practice is different on quashing the writ, unless the Court be equally divided in opinion.

A writ of error was tested in Hilary term, of which the judgment had been entered, but the plaintiff did not enter continuances upon it till Trinity term, which occasioned the writ of error to be quashed. And a question being made as to costs, the Court agreed, that this not being a fault in the writ of error at the time of bringing it, but being occasioned by the act of the defendant in error, which the plaintiff could neither foresee or prevent, it was not a case within the stat. of 4 & 5 Ann. c. 16. which gives costs against the plaintiff in error, upon quashing defective writs of error. Another question arose, whether the plaintiff in error should not have his costs in this case, being defeated of the benefit of this writ of error by the artifice of the defendants in error. And as to this point, *Pratt, C. J.* and *Eyre, J.* were against giving costs, and *Powys* and *Fortescue, Justices*, were in favour of costs being given; hence the Court being divided, the writ was quashed without costs on either side. See 1 *Hullock on Costs*, 346.

(S) OF WRITS OF EXECUTION.

(a) Of *capias ad satisfaciendum*.

1. RAWORTH v. VILLERS. T. T. 1696. K. B. Comb. 433.

Holt, C. J. doubted whether writs of execution are within the statute of amendments.*

2. JOHNSON v. NAYLER. M. T. 1697. K. B. 12 Mod. 247.

The writ of execution bore *teste* in vacation, on motion to have the same amended; the case of *Smith v. Harwood*, in *Jones*. 41. and *Dyer*. 129. were cited, but the Court refused the application.

3. BROWNE v. HAMMOND. E. T. 1738. C. P. Barnes. 10; S. C. Prac. Reg.

25. GARLAND v. SPICER. H. T. 1730. C. P. Prac. Reg. 24. *contra*.

A motion was made after a writ of *capias ad satisfaciendum* had been executed, to amend the writ by the record of the judgment, making defendant's name Edmund instead of Edward, and a rule obtained to show cause, which, on affidavit of service, was made absolute.

4. HUNT v. KENDRICK. T. T. 1772. C. P. 2 Black. 836.

This was an application to set aside a *capias ad satisfaciendum*, the writ being made returnable "before us at Westminster," which is the style of the Court of King's Bench, and not before "our justices," which is the style of the Court of C. P. At the same time the plaintiff moved to amend it by the record of the writ on the roll, and all the preceding process which appeared to have been in the Court of Common Pleas. The Court upon the authority of *Smith v. Haward*, T. Jones. 46. directed the writ to be amended, on paying the costs of both motions.

5. LAROCHE v. WASHBROUGH, DEM. MAILAND. M. T. 1785. K. B. 2 T. R. 737.

Upon judgment recovered against two defendants, a writ of error was brought in the Exchequer Chamber by one of them only, and the judgment having been affirmed and costs given on the writ of error, both the defendants were taken under a writ of execution for the whole sum, including the costs of the writ of error as well as the original sum recovered. On motion, the

* The statutes of jeofails do not extend to writs of execution. 2 Arch. Prac. K. B. 246.

Qu. whether writs of execution are amendable.

At least a writ of execution tested in vacation is not.

But a misnomer on a *capias ad satisfaciendum* is amendable after it has been executed;

[594]
Or in the return;

Or in statement of the sums recovered by the judgment;

Court permitted the plaintiff to amend his writ of execution as to the defendant who did not join in the writ of error, by altering it to the original sum recovered.

6. MACKIE v. SMITH. E. T. 1812. C. P. 4 Taunt. 322.

A rule nisi had been obtained to discharge the defendant out of custody on account of an irregularity in the *capias ad satisfaciendum*, as it purported to have issued against the defendant, "to satisfy James, the debt awarded to John." The plaintiff was, however, on showing cause, permitted to amend the writ upon payment of the costs of the application, as he ought to have applied as soon as he became apprised of the mistake by the service of the rule nisi. See 2 Bl. 836.

7. STEVENSON v. CASTLE. E. T. 1819. K. B. 1 Chit. Rep. 349.

A rule nisi was obtained to discharge the defendant out of custody, and to set aside the *capias ad satisfaciendum* for irregularity, with costs, on the ground that the judgment mentioned in the *capias satisfaciendum* was for 38*l.* when the judgment actually signed was for 80*l.* It was contended that the court would amend the writ. *Per Cur.* The rule may be discharged on payment of costs by the plaintiff, the defendant undertaking to bring no action, and the writ of execution amended.—Rule discharged. See 5 T. R. 577; 8 *id.* 416. *n. a.*; 2 Bl. Rep. 836; Tidd. 6th edit. 1036. 1065. *Note.*—No previous motion had been made to the Court for leave to amend the *capias ad satisfaciendum*.

(b) Of a *feri facias*.

1. JUXON AND UX v. NAYLOR. T. T. 1698. K. B. 1 Com. 60.

A *feri facias* bore *teste* on a day out of term, and the question was whether it was or was not amendable, and the Court would have granted the amendment had there been any award upon the roll for the *feri facias*, by which the amendment could be made. See 1 Sid. 304; 2 Salk. 700; 1 Ld. Raym. 4; 2 Ld. Raym. 1557; 2 Burr. 967; 5 Burr. 2588; 1 Crompt. Pr. 365; Cro. Jac. 162; Yelv. 64; Moor. 45; Hard. 321; 1 T. R. 783.

2. COWPERTHWAITHE v. OWEN AND ANO. In Error. E. T. 1790. K. B. 3 T. R. 657.

The defendants in error had instituted an action in the C. P. at Lancaster, and having obtained a verdict, the plaintiff brought a writ of error in the K. B. in which he was nonprossed. A *feri facias* on the judgment having been sued out of the Court of K. B. a rule was obtained to set it aside, on the ground that the second *feri facias* should have been a *testatum*; but *Per Cur.* Defendants in error are entitled to amend on payment of costs.

the plaintiff afterwards sues out an original *feri facias*, the former may on payment of costs,

3. MEYER v. RING. H. T. 1791. K. B. 1 H. Bl. 541.

The *venue* had been laid in London, but a *feri facias* was sued into a different county, and the party afterwards took out a *feri facias* into the proper county. On *nulla bona* being returned, the Court permitted the first *feri facias* to be amended, by inserting the return of *nulla bona* and the *testatum* clause; although the second writ was returnable several days before the judgment was signed; because judgments relate to the first day of the term, except in the case of *bona fide* purchasers for a valuable consideration. See 3 T. R. 657.

4. ATKINSON v. NEWTON. M. T. 1806. C. P. 2 B. & P. 336.

In this case a writ of *feri facias* had been made returnable on a King's Bench return day instead of a Common Pleas return day. Cross motions were made, one by the plaintiff to award the execution, and the other by the defendant to set aside the proceedings. On a reference to the record, it appeared by the award of execution that the writ was properly awarded. *Per Cur.* The Rule must be absolute for amending the writ: and discharged for setting aside the proceedings.

Or 'to satisfy James the debt awarded to the said John' was amended after execution upon payment of costs. A writ of *capias ad satisfaciendum* varying from the judgment in the amount recovered was amended on showing cause against a rule for setting it aside on payment of costs, & defendant to bring no action. [595] An amendment in a *feri facias* not warranted by the award on the roll refused. But if a *feri facias* be sued out where it should have been a test *feri facias*, and be amended. So when sued out into an improper county. A writ of *feri facias* made returnable on a K. B. instead of a C. P. return day, may be amended by the record of the award of execution. If a return to a writ of venditioni exponere.

nas for
goods al-
ready sei-
zed in ex-
ecution

with a fieri
facias for
the residue
be that he
has made
of the said
goods 20l.
the Court
will permit
an amend-
ment, by
inserting a
return of
nulla bona
to the fieri
facias, and
will set
aside an at-
tach-
ment issu-
ed against
the sheriff
on this
account. Where a
writ of fieri
facias on the
Court of C. P.
required the
sheriff to re-
turning tested

[596]
But the
Court re-
fused to
amend a
fieri facias
where the
party had
become a
bankrupt
before the
goods had
been sold.
Judge's or-
der for an
amend-
ment set
aside on
the ground
that the
particu-
lars were
not set
forth in it.
An order
of nisi pri-
us was not
allowed to
be amend-
ed in confor-
mity with
the terms
of a paper
signed by
the coun-
sel on
both sides

[597]

5. THE KING v. THE SHERIFF OF MONMOUTH, in a cause of LEWIS v. ROBERTS. M. T. 1814. C. P. 1 Marsh. 344.

A writ of *venditioni exponas* had been issued with a *fieri facias* for the residue of a debt due to plaintiff. The sheriff returned, that he had made of the said goods the sum of 20l., which money he had ready; but he omitted to make any return to the writ of *fieri facias*. An attachment was consequently issued against him. The sheriff thereupon paid the money into the hands of the coroner, with notice to retain the same, until the result of an application to the Court (to amend the writs, by returning *nulla bona* to the *fieri facias*, and to stay all further proceedings on the attachment, and to cause the sum paid to the coroner to be returned to the sheriff) should be known. *Per Cur.* An affidavit is made that the omission is a mere mistake of the clerk. Keeping that in view, and considering that the granting this application is in effect allowing to the plaintiff all he is entitled to in this case, we must make the rule absolute. If the sheriff's return prove false, and the defendant be in possession of other goods, the plaintiff has still his action for a false return.—Rule absolute on payment of costs of the attachment, and of this application.*

6. SIMON v. GURNEY. E. T. 1814. C. P. 1 Marsh. 237; 5 Taunt. 605. S. C. Where a writ of *fieri facias* directed to the sheriff to return the money in the Court of King's Bench, instead of "before the King's Justices at Westminster;" the counsel, on the part of the defendant, obtained a rule *nisi* to set it aside for irregularity. It appeared that it was tested by the Chief Justice of the Court of Common Pleas. As there was therefore something on the face of the writ to amend by, it was moved that the writ should be amended. *Per Cur.* Let the rule be discharged, and let the plaintiff amend on payment of the costs of the present application. See 2 B. & P. 336.

7. HUNT v. PASMAN. T. T. 1815. K. B. 4 M. & S. 329. In this case judgment had been given against the defendant and two others, upon a joint warrant of attorney by the three. A *fieri facias* was issued against the defendant, reciting a judgment against him alone, under which his goods were taken; but before the sale he became bankrupt. A motion was now made to amend the *fieri facias* by making it consistent with the judgment. *Per Cur.* If the application had been made earlier, the rule prayed for might have been allowed; but we cannot interfere to the prejudice of third parties. We are not aware of any case in which it has been done. If the rights of third persons had not intervened, the favour of the Court might have been extended to the plaintiff.—Rule refused. See 8 T. R. 153.

(T) OF RULES AND ORDERS OF COURT.

1. PRIDDLE v. SKURRAY AND OTHERS. T. T. 1740. C. P. Barnes. 15. A judge had made an order that plaintiff should have leave to amend his declaration in the particulars annexed to the order. Defendants moved to discharge the order on the ground that the particulars were the substance of the order, and ought to be inserted in the body of it; of that opinion were the Court, and the rule to show cause why the orders should not be discharged was made absolute.

2. PEARMAN v. CARTER. H. T. 1815. K. B. 2. Chit. Rep. 29. A rule *nisi* had been obtained to amend an order of *nisi prius*, by inserting that each party should pay his own costs. It appeared that the cause had been referred by order of *nisi prius* to an arbitrator, that it directed the costs to be paid by the party against whom the arbitrator should give his decision. It was contended, that it was understood between the parties that each should * See 1 Salk. 318; Cowp. 406; Thea. Brev. 305; 1 Boq. 359; 3 B. & A. 204; 3 Saund. 47. n. After *nulla bona* returned to a *fieri facias*, the plaintiffs may sue out a *capias ad satisfaciendum* in all cases where a *capias ad satisfaciendum* can be adopted in the first instance. So if *fieri feci* be returned as to part, the plaintiff may sue out a *capias ad satisfaciendum* as to the residue. See Tidd's Forms, 401. § 101. 102; 10 Went. 257. 293. 308.

pay his own costs. To verify this statement a paper was produced, containing the terms upon which the cause was referred, signed by the counsel on both sides. *Per Cur.* As the understanding of the parties seems all along to have been against the terms expressed in the paper, that document cannot be allowed to nullify the order. The rule must therefore be discharged.—Rule discharged.

3. *RAWTREE v. KING AND ANOTHER.* H. T. 1821. C. P. 2 Moore. 167.

All matters in difference "*in this cause*" were agreed to be referred to an arbitrator. The order of reference, however, stated generally, that "all matters in difference" between the parties were to be referred. A rule *nisi* had been obtained to amend, by inserting the words "*in this cause*," it being a mere mistake of the associate. *Per Cur.* We must discharge the rule.—The parties must go down to another trial, and the order of reference considered as a nullity.—Rule discharged.

An order of reference drawn up generally instead of being as to all matters in difference 'in a cause,' cannot be amended, but the parties must go down to another trial. An indictment is not amendable; [598]

II. IN CRIMINAL PROCEEDINGS.

(A) OF INDICTMENTS.*

1. *REX v. LEWIS.* M. T. 1697. K. B. 12 Mod. 239. *REX v. HOCKENHUL.* H. T. 1686. K. B. 3 Mod. 167. Anon. E. T. 1661. K. B. 1 Keb. 252. *THE QUEEN v. TUCHIN.* M. T. 1703. K. B. 2 Ld. Raym. 1061.

An indictment did not contain the words "*in the country*;" and on motion, the Court refused to amend, observing that the rule was different with regard to informations.

2. *THE KING v. PEWTRESS ET AL.* H. T. 1735. K. B. 2 Stra. 1026; S. C. Ca. Temp. Hard. 203. [598]

An assault was laid several different ways; and on motion to strike out some of the counts from the indictment, the Court refused to allow it, the indictment being the finding of the grand jury.

Or by erasing some of the counts.

3. *THE KING v. ROBERTS.* M. T. 1744. K. B. 2 Stra. 1214.

On a trial at bar of a traverse to an inquisition, one of the jury was called by the name of Henry, who informed the Court that he was christened by the name of Harry, but acknowledged that he was the person summoned. The counsel for the defendant refusing to have it altered, by consent the Court directed the amendment to be made *ex officio*, by virtue of the stat. 8 H. 6. c. 12 & 15.

But if one of the jurymen in the inquisition be misnamed the Court will allow it to be amended *ex officio* :

4. *FAULKNER'S CASE.* E. T. 1668. K. B. 1 Saund. 249; S. C. 2 Keb. 506. S. P. *REX v. LD. BRANDON.* M. T. 1686. K. B. Comb. 70. *REGINI v. HOSKINS.* T. T. 1782. K. B. 2 Ld. Raym. 968.

This was an indictment for keeping an unlicensed alehouse, to which an exception was taken, because it appeared that the jury were not sworn or charged to present any offence within the borough of Southwark, but they were sworn and charged to present offences within the city of London, for the words are "*to inquire for our Lord the King, and the body of the said city*;" and there is no city mentioned before the city of London, and therefore the presentment of the jury of a part in the borough of Southwark was beyond their jurisdiction, for they were not sworn or charged thereto; but *Per Cur.* This objection is not sufficient to quash the indictment, because it is only the mistake of the clerk in certifying the caption, which may be amended in the same term in which it is certified into this court, although it cannot be amended afterwards in another term. The amendment was not ultimately made, the indictment being quashed on another ground.

Or a mis-prision of a clerk as to the caption. [599]

* Indictments are not within the statutes of amendment, and consequently stand upon the same principles with respect to amendment as those to which all pleadings were subject at common law. 1 Hale. 193; Hawk. P. C. 62. c. 25. § 97; Cro. C. C. 44; Bac. Ab. Indictment, G. 11; and as it is the finding of a jury upon oath, it cannot be amended by the Court without the concurrence of the grand inquest by whom it is presented. See 4 Burr. 2570; Hawk. P. C. 2. c. 25. § 98; 6 Mod. 281. But it is the common practice for the grand jury to consent, at the time they are sworn, that the Court shall amend matters of form; hence mere informalities in the proceedings may be amended by the Court before the commencement of the trial, though it was formerly the practice to award process the grand jury to come into court and amend them. See Hawk. P. C. b. 2. c. 25. § 98; Bac. Ab. Indictment, H. 11; C. C. C. 44.

After conviction upon an indictment, removed by *certiorari*, by the defendant the return to the writ may be amended by inserting in the caption the true time when, and the names of the jus-

tices before whom the quarter sessions were holden & also the names of the jurors by whom it was found, and the entry, roll, and record of *nisi prius*, were also amended as to the caption, by making it correspond with the caption in the return but not as to the names of the grand jurors, as their insertion was not necessary.

See 1 *Roll. Abr.* 196; 8 *Co.* 156; 10 *Jones.* 420; *Style.* 85; 1 *Sid.* 155. 175; 2 *Hale. P. C.* 168; *Bac. Ab. Indictment, G.* 11; 2 *Sess. Ca.* 9; 1 *Vent.* 344; 2 *Roll. Rep.* 59; 3 *Mod.* 1617; *Cro. Jac.* 502; 1 *Stra.* 138; 2 *Bulst.* 35; *Comb.* 73; 4 *East.* 175.

5. THE KING V. HILL DARLEY. T. T. 1803. K. B. 4 East. 175.

This was an indictment removed into this Court by *certiorari* for an assault and battery, on account of money won at gaming. After a general verdict of guilty, a motion was made upon an affidavit, stating that the indictment, which appeared, by the caption returned, to have been found at the Midsummer general quarter sessions of the peace, was not found at that time, but at the Michaelmas sessions following; for a rule, calling upon the defendant to show cause why, upon reading the affidavit, and a parchment writing thereto annexed, and the minutes of the Court before which the indictment in this prosecution was found, now produced and shown to this Court, the return to the writ of *certiorari*, issued by this Court, should not be amended by inserting, in the return of the caption, the time when the general quarter sessions of the peace, at which the said indictment was found, was holden, and the names of the justices by whom the said session was holden, and the names of the jurors by whom the same was found, according to the truth of the fact; and why the entry roll in the treasury, and also the record of *nisi prius*, should not be amended as to the caption of the indictment, by making the same agree with the caption, when so amended. The defendant, not being able to oppose the amendment prayed, the rule was made absolute. *Note.* This rule was made on the authority of a similar application granted in the 24 Geo. 3. in the case of *Rex v. Atkinson*, cited 4 East. 177. n. In the case of *Rex v. Aytell*, 27 Geo. 3. cited *ibid.* and in the present case of *Rex v. Darley*, the roll and record of *nisi prius* were not amended by inserting the names of the grand jurors, although in a prior case the names of the grand jurors had been introduced, it being considered unnecessary. In the case of *Rex v. Atkinson* such amendment was inserted.

(B) OF INFORMATIONS.

1. THE KING V. NIXON. T. T. 1731. K. B. 1 Stra. 185. S. P. THE ATTORNEY-GENERAL V. HENDERSON. E. T. 1797. Exch. 3 Anst. 714. REX V. GOFFE. T. T. 1664. C. P. 1 Lev. 189.

The Court refused to quash an information upon motion; *Eyre, J.* objections area- serving that such informations were always amendable.

2. THE KING V. HARRIS AND OTHERS. H. T. 1693. K. B. 1 Salk. 47. S. P. BENSON V. OFFLEY. H. T. 1685. K. B. Comb. 45. EDGELL V. DECKER. T. T. 1728. Ex. Bunb. 252.

A motion was made to amend an information for perjury, and opposed because the defendant had pleaded. *Per Holt, C. J.* As to amending after plea pleaded there is no objection in that. I have known a record amended after it has been sealed up, and just before the trial of the cause. *See* 4 Burr. 2527; 4 T. R. 457; 3 Lev. 347.

3. THE KING V. SEAWARD. H. T. 1726. K. B. 2 Ld. Raym. 1472; S. C. Stra. 739. S. P. THE QUEEN V. STEDMAN, M. T. 1708. K. B. 2 Ld. Raym. 1307.

On an information against the defendant for giving a challenge, the defendant pleaded in abatement that he was a surgeon and not a gentleman, as styled in the information, the Court gave leave to amend on payment of costs.

4. THE KING V. HOLLAND. M. T. 1791. K. B. 4 T. R. 457.

On an information by the attorney-general for offences committed in India, founded on the statutes 24 G. 3. c. 25. and 26 G. 3. c. 27. the defendant demurred, and the former obtained a rule for the amendment of the information. After cause had been shown. *Per Cur.* As far as this information has already proceeded, there is nothing to distinguish it from other informations; amendments upon information are a matter of course. They are even grantable upon application to the judges at their chambers.—*Rule absolute.*

5: **REX v. HOCHENHÜLL.** M. T. 1686. K. B. 3 Mod. 167; S. C. Comb. 73.

An information was exhibited against the defendant for a riot, of which he was found guilty. An exception was taken in arrest of judgment, *memorandum quod ad general quarterial session pacis tent, &c. die sabati prox' post quindenam Sancti Martini presentat existet quod*; the defendant 27 *die Januarii* in such a year *vi et armis, &c.*; that the fact was laid after the indictment which was exhibited against the defendant at the Michaelmas sessions, and laid to have been committed in January following. *Per Cur.* It is not only amendable at the common law, but by several statutes, which extend to all misprisions of clerks, except treason, felony, and outlawry.

Or after verdict.

And the alterations may be made to any extent — thus counts may be struck out; [601]

6. **THE KING v. PEWTERUS.** H. T. 1735. K. B. Ca. Temp. Hard. 203.

The Master moved that several unnecessary counts might be struck out of an indictment. *Lord Hardwicke, C. J.* How can we strike out any thing that the grand jury might have found? We might do it in an information.

Nor will the defendant always be entitled to costs, or at liberty to plead *de novo*.

7. **THE KING v. CHARLESWORTH.** T. T. 1730. K. B. 2 Stra. 871; S. C. 1 Barnard. 342.

On an information for forging a warrant of attorney, to acknowledge satisfaction on a judgment of E. T. after issue joined, the record appearing to be of Hilary term, the information was amended without costs, the prosecutor having been admitted a pauper, and without giving the defendant leave to plead *de novo*. The *Queen v. Simmonds*, 3 Lev. 347. was cited as an authority, where the title of an act set forth in an information was amended.

But after the record had been carried down for trial the venue cannot be amended.

8. **THE KING v. CLENDON.** T. T. 1731. K. B. 2 Stra. 911; S. C. 2 Barnard. 6.

Information for an assault. The record had been carried down to trial, and withdrawn. The Court refused to amend the venue by changing it from one county to another.

These amendments may be made by a judge at chambers;

9. **REX v. JOHN WILLES, Esq.** H. T. 1770. K. B. 4 Burr. 2527.

In an information for a libel, the counsel for the crown, after the record had been made up, and the cause was ready for trial, thought it expedient to amend the record by striking out the word "purport," and inserting in its place the word "tenor;" accordingly an application was made to Lord Mansfield for a summons to show cause why such amendment should not be made; and a summons having been granted, his lordship was attended at his own house by the attorneys and clerks in court on each side, and made an order that the information should be amended by striking out the word "purport" in the several places where it was mentioned, and inserting, instead thereof, the word "tenor." This amendment became afterward a subject of considerable debate; but the Court were ultimately of opinion that it was correct, and that as it was not objected to at the trial, the proper opportunity of taking the objection was passed. *Vide ante*, p. 600. case 4.

10. **ANON** T. T. 1699. K. B. 1 Salk. 50.

On a motion to amend an information of forgery in ten places, and though opposed, the motion was granted, because it made no alteration of the fact, and that without costs or imparlance.

And where they do not alter the facts, without costs.

(C) OF PLEAS.

1. **THE KING v. KNOWLES.** T. T. 1693. K. B. 1 Salk. 47.

On an indictment for murder the defendant pleaded that he was Earl of Banbury, &c.; the attorney-general replied; the Earl moved to amend his plea, and obtained permission, (*Holt, C. J.* doubting) because the pleadings were neither perfected nor entered on record. *Note.*—The plea was filed, but not entered on the roll; and the Court admitted, that before judgment, while matters were in *feri*, and in agitation, they had a power over all the proceedings. See 1 *Burr.* 1099; *Comb.* 273; 3 *Salk.* 242; *Skin.* 336; 1 *Com. Dig. Amendment.* 2 C. 1.

Pleas to indictments are amendable at common law before they are filed; [602] Or a plea to a *scire facias* on the crown side of the court.

2. **THE KING v. BETTS AND OTHERS.** H. T. 1725. K. B. 1. Stra. 686.

To a *scire facias* on the crown side, on a recognizance for keeping the peace, the defendant, as to the breach assigned, pleaded not guilty; but concluded

it with an averment, instead of concluding to the country; and after demurrer it was moved to amend the plea, which was granted.

3. (D) OF THE VERDICT AND RECORD.

In criminal cases verdicts general or special cannot be amended.

Sed sem. this rule only applies to capital cases;

And that verdicts may be amended by any notes or minutes;* At least in matters of form.

At all events these amendments may be made when the mistake has originated with the defendant's clerk in court.† [603] An amercement certain is innature of a customary fine, and may be imposed by the steward of a leet, and need not be assented to by the lord.

If an amercement be discretionary, it merely to fulfil the evident intention of the jury, the Court will, in all cases, allow it to be effected. 1 Chit. Crim. L. 646.

be assented to by the lord.

it is ascertained by the court.

expressly from some statutory enactment; but amercements are impositions arbitrarily imposed, there being no court of record, other courts can only amerce. 8

1. BOLD'S CASE. H. T. 1706. K. B. 1 Salk. 53.

Per Cur. A verdict general or special may be amended by the notes in the book of the clerk of assize, if there be a misprision; but this is to be intended in civil, and not in criminal cases. *See Kely.* 1; 3 *Cro.* 149.

2. REX v. KEITE. H. T. 1696. K. B. 1 Ld. Raym. 141; S. P. *per Butler, J.* in HAZEL'S CASE, 1 Leach. 332.

Indictment for murder; the jury found a special verdict. *Per Holt, C. J.* If the verdict is imperfect no judgment can be given, but a *venire de novo* ought to issue; for though it is a special verdict, yet it cannot be amended by the notes, in felony, as it might in civil causes. *See Hawk. P. C. b. 2. c. 47. § 4; S. C. 1 Salk. 47. 53.*

3. ANON. T. T. 1705. K. B. 11 Mod. 84.

Per Cur. We are of opinion that the entry of a special verdict, even in a criminal prosecution, may be amended, if not entered according to the notes or minutes, and the roll may be amended. *See Raym.* 460; *Drake's case*, 11 Mod. 85; 1 Burr. 383. *Doug.* 746; *Yelv.* 186; 1 Wils. 35; *Stra.* 1197.

4. REX v. WOODFALL. M. T. 1770. K. B. 5 Burr. 2663.

It was argued in this case in argument, and not denied, that a verdict could not be amended in matters of fact; but it might be perfected in point of form. *Sec 1 Stra.* 515; 2 *Stra.* 845; 1 *Doug.* 375; 1 *Hawk. P. C. b. 2. c. 47. § 9.*

5. THE KING v. HAYES. T. T. 1729. K. B. 2 Stra. 843; S. C. 2 Ld. Raym. 1518; S. C. Barnard. 112.

The defendant was indicted for forging a bond; and on the trial there appeared a variance in the addition of the obligor, on which a special verdict was found; the judge before whom the cause was tried, doubting whether it was a variance or not, it being Peroch for Paroch; and after the verdict was drawn up, the prosecutor moved for leave to amend the *nisi prius* roll by the record of the indictment, which was right; and alleged that the record of *nisi prius* had been made up by the clerk in court of the defendant, who might be suspected to have made it wrong on purpose. The Court seemed to think this was amendable at common law, there being something to amend by; but they said there was no occasion to give any opinion on that, since they were warranted in amending it, as being a fault committed by the defendant, who ought not to take advantage of it. *See Cro. Jac.* 302; 1 *Leach.* 276; 1 *Chit. Crim. L.* 482.

Amercement.† *See 2 Vin. Ab. tit. Amercement; Com. Dig. Distress; Leet, O, 1, &c.; Pleader, 3 K. 27; Prerogative, D. 58; Somers, E. 7. And post. tit. Bailiff; Constable; Distress; Fine; Jury; Replevin; Sheriff; Trespass.*

1. MORGAN'S CASE. T. T. 1723. Ex. 8 Mod. 596; S. C. Gilb. Eq. Rep. 209.

In trespass for taking cattle, &c. the defendants justified as servant to one Morgan, setting forth that Morgan was seised of the manor of D. in fee to which a court leet belonged; and that time out of mind there had been a cus-

* Lord Mansfield in *Hazel's case*, 1 Leach 323 said: If there be minutes to amend a special verdict by, it may be amended even in capital cases.

† From the whole of the cases it may, perhaps, be inferred, that where the alteration is intended to fulfil the evident intention of the jury, the Court will, in all cases, allow it to be effected. 1 Chit. Crim. L. 646.

‡ In *Terms de Ley*, 40. it is stated that an amercement is properly a penalty assessed by the peers or equals of the party amerced for the offence committed, for which he puts himself at the mercy of the lord. The difference between amercements and fines has been thus expounded: fines are described to be punishments certain and specific, and derived expressly from some statutory enactment; but amercements are impositions arbitrarily imposed, there being no court of record, other courts can only amerce. 8 Co. Rep. 394.

tom that quilibet tenens of a freehold tenement, and who was a resident and an inhabitant within that manor, ought upon notice or summons, to appear personally at the said court leet, three times in every year, viz. &c. and for default of appearance at the said courts, to pay to the steward of the said leet, to the use of the lord, 7s. for every default; and that if he did not appear at two of the said courts, but did appear at the third, then to pay an essoign penny only; and further, that if any such tenant, being summoned to be of the grand jury, should not appear, that then he shall be amerced 7s. by the steward; and that the bailiff of the manor, by warrant from the steward, might distrain for such amerciaments, and all the distress, &c; he then set forth that the plaintiff was summoned to appear at two several courts, and made default; and that he was likewise summoned to be of the grand jury, &c. but did not appear at that court, for which defaults he was amerced 28s.; and because it was not paid, Richard Hughes, steward of the said leet, made his warrant, directed to the defendant, to levy the same by distress and sale of the plaintiff's goods, virtute oujus he distrained the cattle, &c. and sold them, and paid 28s. to the steward, for the use of the lord of the said manor, *quæ est eadem transgressio*, &c. Upon a demurrer to this plea, several exceptions were taken: 1st. That the custom was void, because it was laid too general. 2dly. That it was void, because it empowered the steward to amerce without any *affeerment*. 3dly. That there was a double amerciament for one and the same default at one court, viz. in not being of the homage, and not appearing at that court. The Court were of opinion, as to the first point, that the custom was well pleaded, it being agreed that the custom would have been well laid if the exemptions had been set forth and not so general that quilibet tenens should appear, &c. but it is certain that such exemptions, which are by the common law, as of infants under 12 years, and women, were never set forth in pleading of customs. But it has been objected that by the statute of Marlbridge, clergymen are exempted, that this custom cannot prevail against that statute, which is very true; but this does not alter the method of laying a prescription or custom in pleading, which, ever since this statute was made, had been stated without mentioned any exemptions, but generally, as in this case. It is true if any particular person had been exempted by the custom itself, such exemption must have been set forth in pleading, because the custom is entire, but it is not necessary to set forth any other exemptions; therefore this custom is well laid. The statute of Marlbridge never intended by the exemptions of ecclesiastical persons, to destroy *legis loci*; but those laws still remain as they did before; and persons who will have any advantage of them must plead them, for it is the nature of exemptions to be exceptions out of the general rule, and it will be not only informal but unreasonable to set them all forth in pleading. As to the second point, the Chief Baron and two of the *Puise* Barons were of opinion that amerciaments are to be *affeered* unless they are in nature of a fine, and that there is no occasion for an *affeerment* but where the amerciament is discretionary, which is not this case, for here the sum is ascertained by custom that the steward cannot increase or diminish it, and therefore this amerciament ought not to be *affeered*, 1st, because it is in the nature of a fine for a contempt; 2dly, because the custom has ascertained it. But the other Baron differed; for he was of opinion that if the custom be abrogated by *Magna Charta*, then this amerciament must be *affeered*, that the custom was repealed by that statute by which it is enacted that all amerciaments shall be *affeered per pares*; it is true fines are not within this statute, but amerciaments are; a fine is a ransom from imprisonment, and where-ever a leet may imprison, it may assess a fine as a price to redeem the party from an imprisonment, and a commitment always follows a fine, and therefore a *capiatur* lies for fineable offences; but in amerciaments where the judgment is, that the party shall be in *misericordia*, as it is in this case, there they are to be *affeered*. It is true the amerciaments of peers are made to certain sums, but it is by order of the House of Lords, and this was to prevent the frequent applications to the house when a peer was to be amerced; but the principal case being only a nonfeasance, and no breach of the peace or con-

[605] tempt of the court, the steward cannot set a fine for it; and if so then it falls back into an amerciament, and must be aſſeſſed per judicium parium. And as to the third point, the Court were divided: the Chief Baron being of opinion that two amerciaments were incurred; viz. for a default in not being of the grand jury, and for a default in not appearing at that court; and where a man is bound to appear in two respects, and doth not appear in two respects, each omission is a distinct and several default. And another Baron was of the same opinion: viz. that it is not a double amerciament for the same default; for if an officer who ought to attend the court by virtue of his office, and likewise as a grand jurymen, should make default he is to be fined in both respects, and in one there is no consideration to be had of the other; therefore notwithstanding this objection, the plea is good. But two of the barons were of opinion that this custom was void, because it was unreasonable, and it involved every person in it, when some persons might have a reasonable excuse to be absent, as, for instance, a sheriff may be called to attend on the king's person, &c. Subsequently the Court held the custom good.

2. *MATHEWS v. CARY*, M. T. 1686, K. B. 3 Mod. 137; S. C. 1 Show. 61; S. C. Carth. 73; 3 Salk. 52; S. C. Holt, 40; S. C. 11 Comb. 76; S. C. 1 Salk. 107.

An amerciament differs from a fine; the latter is the act of the Court, the former the act of the jury. In justifying a trespass for seizing a chattel as an amerciament, the warrant must be set forth.

Trespass for entering plaintiff's house, and taking a silver tankard; the defendant made conuſance as bailiff of the dean and chapter of Westminster, for that the place where, &c. was within the jurisdiction of the leet of the said dean, who was seised of a court leet, which was held there such a day, &c. and that the jury presented the plaintiff (being a tallow-chandler,) for melting of stinking tallow, to the annoyance of the neighbours, for which he was amerced, and that the amerciament was aſſeſſed to five pounds, which not being paid, the defendant, by a mandate of the said dean and chapter, distrained the tankard, &c. The plaintiff replied *de injuria sua propria, absque hoc*, that he did melt tallow to the annoyance of the neighbours, &c. The defendant demurred to this replication; and it was argued that if such a presentment is not traversable, the party has no remedy; it is contrary to the opinion of Fitzherbert in *Dyer*, 13, pl. 64. who stated the law to be that it was traversable, and that if, upon such a presentment, a fine should be imposed erroneously, it might be avoided by plea, and this agrees with the second resolution in *Godfrey's case*, 11 Co. 42. 2dly. It was then objected to the plea that it was not good, for it set forth that the plaintiff was amerced, and it was aſſeſſed at the court, and so he has confounded the office of the jurors and aſſeſſors together to others; if it had been a fine it ought not to be aſſeſſed, because that it is imposed by the court; but this is an amerciament, which is the act of the jury, and therefore it must be aſſeſſed. 3dly. The chief exception was to the matter of the warrant, viz. the defendant set forth that he seized by virtue of a precept from the dean and chapter, whereas he ought to show it was directed to him from the steward of the court, and then have set forth the warrant, without which he cannot justify distraining for an amerciament. The whole Court were of this opinion, and judgment was given for the plaintiff, the Court observing, that if it had been in replevin, where the defendant makes cognizance in the right of the lord, it might be well enough, as here pleaded; but where it is to justify by way of excuse, it should aver the fact, and allege it to be done, and set forth the warrant itself, and the taking virtue warranti for a bailiff of a liberty cannot distrain for an amerciament by virtue of his office, but he must have a warrant from the steward or lord of the leet for so doing. See 1 Chit. Pl. 493, 494. 3d ed.; 2 Selw. N. P. 386. 5th ed.

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3. *FLETCHER v. INGRAM*, M. T. 1634, K. B. 5 Mod. 127; S. C. 1 Ld. Raym. 69.

Or by the lord of a leet, the custom must be stated.

In an action of replevin, the defendant made conuſance that the place in which, &c. was within the manor of S. where there was a court leet, and that the jury of the leet, time out of mind, had chosen one of the inhabitants within the manor to be constable, and that the person chosen, by the custom, was to serve or forfeit a reasonable penalty, to be imposed by the jury at the said leet; that the plaintiff was elected accordingly, and ordered to assume the office under a penalty of 40*l.* and had notice thereof, but neglected, which

was presented at the next leet, and that he had thereby forfeited 40*l.* for which the defendant, as bailiff to the lord, took the distress. Upon demurrer and joinder in demurrer.

Per Cur. Of common right the constable is to be chosen by the jury in the leet, and if a party be chosen and refuses to act, the steward may fine him and present his refusal at the next court, and then he shall be amerced; but a custom ought to be alleged authorizing the distraining for the penalty, which is omitted in these pleadings.—Judgment for plaintiff.

4. *BROOK v. HUSTLER*, E. T. 1705, K. B. 11 Mod. 76.

A writ of error being brought on a judgment in debt in the Common Pleas for an amercement in a court leet. The defendant, it appeared, had made default of suit after a general notice, and the amercement was affirmed.

Per Holt, C. J. The jury may amerce in a certain sum if they will, and then there needs not an afferment, though the proper way is, *ideo sit in misericordia*, and then an afferment. The counsel took an exception to the pleading, that the court being uncertain when it would be held (that is, where the lord may hold it when he pleases,) a particular and convenient notice ought to be given when and where the court is to be held; 32 or 22 Edw. 4, 27, b. 28, a; Cro. Eliz. 353, 555, 556. A general notice in the church is not notice to incur a forfeiture, unless there be particular custom for it. *Per Holt, C. J.* We cannot judge of the notice, because you ought to have shown particularly that he was summoned to the court at such a day and place there to be held, &c. *the plead* *But it must be shown in a court leet with out an afferment.* *Powell, J.* To take advantage of a forfeiture notice should be personal, unless the defendant had no notice of the day and place. [607]

See 1 Brown. 166; Winch. 987; Co. Ent. tit. Error, 280, 284.

5. *STEPHENS v. HAUGHTON*, M. T. 1728, K. B. 2 Stra. 847; S. C. Fitz. 108.

In replevin the defendant avowed for a distress by a precept from the court A plea of leet of the dean and chapter of W. and set forth the holding of the court and that the plaintiff being a baker, and an inhabitant within the said liberty of Westminster, it was presented at a court holden at such a time; that the plaintiff sold bread under the assize, for which he was amerced so much by the jury, and so set out several amercements at several times, which the plaintiff, "although he was guilty, refusing to pay, the defendant distrained and avowed," &c. to which the plaintiff demurred. The following exceptions were taken to the conusance; 1st. It is not averred that the plaintiff was an inhabitant within the liberty of Westminster, at the time of the amercement. 2dly. It is not averred that he committed the fact, but only that it was presented by the jury, which is not enough in an avowry, where the defendant is an actor, making a tithing, and therefore an avowry differs from a bar to an action of trespass, where the party is only to excuse the supposed wrong. 3dly. The amercement is by the jury, whereas it should be by the court, and not assessed by the jury; and there should have been a special afferment. *Raymond, C. J.* The want of an averment that the fact was committed is fatal; and the difference between trespass and replevin is well founded in reason, and is supported by authority; and here the "although," &c. is not an issuable averment; then the avowry is nought, not because the amercement is not laid to be affirmed, for that is not necessary, the decision in Hob. 129. having been denied by Holt, Chief Justice, in that case of *Matthews v. Carey*; but the fault is in this, that the amercement is by the jury, whereas it should be by the judgment of the court, that he may be amerced, and the part of the jury is only ministerial, for they are to carry the act of the court into a certainty. The plaintiff had judgment.

6. *THE DUCHESS OF HAMILTON v. INCLEDON*, M. T. 1719, K. B. 1 Stra. 225.

Per Cur. In *misericordia*; &c. is a good entry of the the amercement of a peer.

7. *WOOD v. LOVEATT*, H. T. 1796, K. B. 6 T. R. 511.

On demurrer this appeared to be an action of trespass for distraining the plaintiff's property; to which a justification was pleaded, under process of a does not en

title the
lord of the
manor to
an amercement.

court leet, for an amercement, for a private injury committed to the lord's waste. *Per Cur.* The case in the year books, 12 Hen. 4, 3. is conclusive against the tenability of the plea.—Judgment for plaintiff.

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America.

1. FOLLIOTT V. OGDEN, H. T. 1789, C. P. 1 H. B. 123; S. C. Affirmed on Error, T. T. 1790, K. B. 3 T. R. 726.

The acts of
confiscation
in the several
states of
North America
are considered as
nullities in
the courts
of law in
this country,
consequently a
creditor is
not precluded
from recovering
against his
debtor in
England,
upon a contract
entered into
between them
in N. A. although both
parties
have been
attainted,
and their
property
confiscated
and vested
in the respective
states of
which they
were inhabitants,
by the legislative
acts of those states

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To debt on a joint and several bond between the defendant, R. M. and L. M. of the one part, and the plaintiff of the other, dated New-York, 1769, the defendant pleaded; 1st. That R. M. and L. M. *solverunt post diem*. 2dly. That he, the defendant, *solvit post diem*. 3dly. At the making of the bond the parties resided in America, and continued so until after 1777, when the money being due and unpaid, and the plaintiff being *ipso facto* attainted of the offence of adhering to the enemies of the state of New York, and all his property, both real and personal, being forfeited to the people of New-York, and that the said bond was, and still is, vested in the aforesaid state. The 4th plea, after stating that the parties resided at America, alleged that he, the defendant, was bound only as a surety, and that he had more than sufficient to pay, but he being attainted, all his real and personal estate was forfeited to the state of New-Jersey, subject to the payment of all his debts, and that the plaintiff might and should have made a demand of the state of New-Jersey, for the money, &c. 5th. Similar to the 4th. After replication, re-rejoinder, surrejoinder, and rebutter, there was a general demurrer to the rebutter, and joinder in demurrer. The two material questions which arose were; 1st. Whether these pleas were a bar to this action; and 2dly. If not whether a bond made in America can be sued on here.

Per Cur. It is only incumbent on us to examine the third and fourth pleas, which state that the plaintiff was attainted by the state of New-York; that all his estate and effects were confiscated and forfeited to the people of that state; and that, in consequence, the bond, and all money due upon it, was forfeited to them. Now, admitting this act of the state to be as valid as any act of an independent state, it cannot operate as a bar to the plaintiff's demand; if it were a bar it must either be in respect of his person, or the subject matter of the suit. Now it is clear that a sentence of an independent state does not carry with it such a personal disability as to divest a party of his right of action in England. The subject of this action being a bond it could only be sued for according to the laws of England relating to bonds; therefore, if the plaintiff's right be destroyed, that could not be set up in bar of the action; for, as choses in actions are not assignable, any suit on the bond must have been brought in the name of the present plaintiff, and him only. Now this brings us to the other question which arises on the fourth plea, which is similar to the third, but it only amounts to a ground in equity for relief against a creditor, who would make an oppressive use of his power against a surety in preference to the principal; but if the plaintiff in this action might have recovered his debt, out of the fund appropriated to that purpose in New-Jersey, and has wilfully omitted so to do, we think there would be a good reason for equity to interfere; but in a court of law, nothing short of payment is available.—Judgment for the plaintiff.

The defendant afterwards brought a writ of error in the Court of King's Bench; and after argument, *Per Cur.* Whether or not the report in first Hen. Black. of the decision given in the Court of Common Pleas be accurate, we will not presume to say; but we do not assent to the reasoning on which the Court founded their judgment, although we are of opinion that it should be affirmed. The Court of Common Pleas, in giving judgment, stopped at the pleas; but the judgment which we are prepared to pronounce being founded on the whole of the pleadings, renders it necessary that we should examine and delineate them. The plea does not, after stating that the property was confiscated, and that the plaintiff and defendant were resident in America, allege that they were resident in or subject to the laws of that state when the treaty of peace was signed; but it is not necessary to say what effect that

would have had, since it stands thus, that the province set about a reform, and, to assert what is called their rights, which most undoubtedly was illegal at that time, whatever confirmation it might afterwards receive, these parties came here as subjects of this country before the treaty of peace, and therefore any acts done by the state of New-York at that time could not alter the right of our own subjects. The plaintiff and the defendant came into this country in the character of debtor and creditor, and their relative situations as individuals was not affected by the acts of confiscation. But it has been said that where the property of a subject of one country is confiscated and vested in a sovereign state, every other country ought to take notice of the confiscation. In answer to that we will apply the general principle that the penal laws of one country cannot be taken notice of in another. But here these persons were never admitted by any act of an independent state. The inhabitants illegally assumed to themselves the power of making laws; we are therefore clearly of opinion that the act of confiscation, which passed in 1779, cannot be considered in this country as competent to transfer the property of Folliott to any person whomsoever; consequently the right of action which accompanied him when he came into this country is not divested.— Judgment affirmed.

2. *WILSON v. MARRYATT*, M. T. 1798. K. B. 8 T. R. 31. Judgment affirmed in Exchequer Chamber, 1 B. & P. 430.

In this case the construction of the treaty of amity, commerce, and navigation, entered into between Great Britain and the United States on the 19th of November, 1794, came into question. By that treaty it was stipulated that the citizens of the United States might freely carry on a trade between the British territories in the East Indies and the said United States, in articles not entirely prohibited.* It was contended that the intercourse allowed by this treaty was only immediate and direct between America and the East Indies, and that the facts of the present case constituted an infringement upon the requisitions of that article, it appearing that the voyage by the parties was of a circuitous nature, the goods intended to be adventured having been shipped from London and Bordeaux in an American vessel.

Per Cur. The present question may be easily settled by referring to the treaty entered into between the United States and Great Britain, with reference to the trade to be carried on between the former and the West India Islands. By the article which immediately precedes the stipulation now in question, it was agreed that the trade was to be immediate and direct; the *terminus a quo* and the *terminus ad quem* being distinctly stated; it is there alleged that the United States are to prohibit goods of the produce of the West India Islands in American vessels to any port of the world except the United States. But in the particular article now in question the words used are general, viz. that the trade might be carried on between the British territories and the East Indies. It has been even conceded during the argument, that a party might have come from America to other countries in Europe, and bought goods, and carried them back to America, and from thence to the East Indies. What they could therefore do indirectly they may certainly do directly. From the whole context of the treaty before us, and the most obvious interpretation of the expressions, as well as from the evidence afforded us from the contrast of the article immediately preceding it, we are of opinion that the nature of the trade to be carried on between the United States of America and the East Indies is not limited and circumscribed, but that it may be circuitous as far as the parties engaged in it may deem expedient. See the statute relative to this treaty, 37 Geo. 3. c. 97, and the treaty of commerce with America, July 1815.

3. *WILSON v. MARRYATT*, M. T. 1799. K. B. 8 T. R. 31; Judgment affirmed in Exchequer Chamber, 1 B. & P. 430.

In this case it became a question whether an adopted subject of the United

* This article was to be limited in its duration to twelve years, to be computed from the day on which the ratifications of this treaty were exchanged. It was ratified in the year 1795, and therefore expired in 1807.

According to a treaty of commerce between G. B. and the U. S. A. the citizens of the U. S. were empowered to carry on trade between the British territories in the E. Indies & the U. S. Held that it was not necessary that such trade should be a direct and immediate trade from the U. S. to the British territories.

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And a British born subject, domiciled in the U. S. was held entitled, under such treaty, to trade to the E. In

States of America, being a natural born subject of the King of Great Britain could trade to the East Indies under the treaty of 1794, entered into between Great Britain and the United States of America? *Per Cur.* If it be once granted (which is clear beyond a doubt) that natural born subjects of the King of Great Britain may become subjects of the United States, the question is solved. He then becomes entitled to all the privileges attached to the character of a subject of the state by which he is adopted. His character of natural born subject here cannot controul or suspend the legal operation of his rights as a subject of such country. There is no disabling principle in the law of nations, that in the parent state the adopted subject is incapable of enjoying the privileges which have been conceded by the parent state to the other subjects of that state which has adopted him. The present plaintiff may therefore legally trade to the East Indies, and is entitled to all the privileges and advantages accruing to the inhabitants of the United States, as consequent upon such commerce. See Vattel, b. 1. c. 18. s. 20 to 22.; Co. Lit. 129; Fost. C. L. 184; Huberus. b. 1 tit. 3. c. 2. s. 12; 19 Car. 2. c. 18; Dyer. 296. a; Com. Rep. 677; Reeve's Law of Shipping, 252.

4. BARING AND OTHERS V. CHRISTIE. T. T. 1804. K. B. 5 East. 398. S. P. BARING V. CLAGGETT. T. T. 1802. C. P. 3 B. & P. 201.

The requisitions of the 29th article of the treaty of 1778. between France and America, that their vessels in [611] case of war should carry a passport expressing the place of habitation of the commander, are not complied with by a passport granting leave "to A. R. commander of the ship called the M. V. of the town of P. of the burden of, &c.

This was a writ of error on a policy of insurance upon goods on board a ship warranted American, at and from Philadelphia to London. At the trial a special verdict was found, which, after stating the making of the policy, the subscription of the plaintiff in error, &c. found, that by the 25th article of the treaty between France and America, it was provided, "that in case either of the parties should be engaged in war, the ships and vessels belonging to the people of the other ally must be furnished with sea letters or passports, expressing the name, property, and bulk of the ship, as also the name and place of habitation of the master or commander of the said ship, which passport shall be made out and granted according to the form annexed to the treaty." The form of the passport, which the ship had actually on board at the time of the capture, was as follows, "That leave had been granted to A. B. master and commander of the said ship, called the Mount Vernon, of the town of Philadelphia, of the burden of 424 tons or thereabouts, being at present in the port of Philadelphia, and bound for Hamburg," &c.

Per Cur. The special verdict not having found what the form of the passport was which was annexed to the treaty, we can only look to whether the passport discovered on board the ship be or be not consistent with the 25th article of the treaty. We cannot, therefore, without a misconstruction of the import of the terms used in the passport found on board, construe it so as to say that it is conformable to the requisitions of the treaty. The words, "the town of Philadelphia," can only refer to a description of the place of abode of the master. The rule of law as well as of grammar is, that *ad proximum antecedentem fiat relatio nisi impediatur sententia*. "The ship called the Mount Vernon" is in the present instance the last antecedent, and can only, therefore, by every fair rule of construction, be coupled with the words "of the town of Philadelphia," the sentence does not, however, end here, but goes on to state the burden of the ship, which evidently shows that the whole passport refers to a description of the ship, and that only. The judgment given in the court below must therefore be affirmed, leaving all other questions (if the plaintiffs in error shall proceed against any of the other underwriters) open to evidence of this passport having been in accordance with the form annexed to the treaty, or that which has been adopted by some subsequent international arrangement.—Judgment affirmed.

Amicus Curiae.

A counsel, or any other person, though not interested in the cause may as amicus curiae, inform the Court

1. REX, v. BUCKERIDGE. E. T. 1682. K. B. 3 Show. 297; S. C. Skin. 159. After the prisoner had been convicted of forgery, several exceptions were taken in arrest of judgment. *Sed per Cur.* They cannot be heard unless in the presence of the prisoner. The counsel then urged that he might, as

amicus curiæ, inform the Court of an error in the proceedings, to prevent them from giving a false judgment at any time, although he could not be heard in mitigation of punishment unless his client was present. *Sed per Cur.* The party's presence is a *sine qua non* in both cases. Vide 2 Inst. 178; 4 H. 6, 16; 9 H. 6, 39; 2 E. 3, 43; T. T. 26; E. 365; 19 H. 6, 10; 34 H. 6, 8; 5 E. 4, 86.

of error in the proceedings, to prevent their giving a false judgment.

2. *REX v. VAUX*, H. T. 1684, K. B. Comb. 13.

Per Cur. Any one, as *amicus curiæ*, may move to quash an indictment, apparently vitious, whatever the crime may be.

DOVE v. MARTIN, M. T. 1683, K. B. Comb. 170.

If an action be abated, any one, as *amicus curiæ*, may move to have the verdict set aside, even the defendant himself.

4. *BROWN v. WALKER*, M. T. 1683, C. P. 2 Shower, 406.

On an application for a prohibition to the Admiralty Court, the Court intimated, that if any person, as *amicus curiæ*, would inform the Court of any usurpation by the Ecclesiastical Court, or of any other inferior court, then they would grant a prohibition.

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And one may, as *amicus curiæ*, move to quash an indictment; Or to set aside a verdict after the action is abated. Or to inform the court of an usurpation of jurisdiction by an inferior court.

Ancestor. See tit. Bond; Devise; Heir.

Ancient Demesne.*

(A) OF THE COURT ANCIENT DEMESNE, p. 613.

(B) TO WHAT ACTIONS ANCIENT DEMESNE IS PLEADABLE, p. 613.

(C) REQUISITES OF PLEA, AND WITHIN WHAT TIME TO BE PLEADED, p. 614.

(D) REPLICATION, AND SUBSEQUENT PROCEEDINGS, p. 615.

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(A) OF THE COURT OF ANCIENT DEMESNE.

THE CITY OF LONDON v. WOOD, H. T. 1700, K. B. 12 Mod. 683.

Per Holt, C. J. A court of ancient demesne is no more a court of record than a court baron, and no difference can be made between the two tribunals. See 4 Inst. 269; 3 Leon. 63; 4 T. R. 46; Lutw. 714, 773; 1 Salk. 339; and vide post, tit. Fines and Recoveries.

ancient demesne are not Courts of record.

(B) TO WHAT ACTIONS ANCIENT DEMESNE IS PLEADABLE.

1. *MORRIS' CASE*, T. T. 1718, K. B. 11 Mod. 301. *S. P. ISTEED v. CLARK*, T. T. 1685, K. B. Comb. 40. *ROE, DEM. RUST, v. ROE*, T. T. 1760, K. B.

* Under this denomination is comprised those lands or manors which though now granted to private individuals, were actually in the hands of the crown in the time of Edward the Confessor, or William the Conqueror. The number and names of all manors, after a survey made of them, were written in the Domesday Book; and those which by that document appear to have at that time belonged to the crown, and are contained under the title *terra regis*, are called ancient demesne; Kitch. 98. The lands which were in the possession of Edward the Confessor, and were given away by him, are not at this day ancient demesne; nor any others, except those actually recorded in the Domesday Book: and therefore, whether such lands are ancient demesne or not, is to be tried only by that ancient register; 1 Salk. 57; 4 Inst. 269; Hob. 183; 1 Brownl. 43; F. N. B. 16. D. But if the question be, whether lands be parcel of a manor which is ancient demesne, this shall be tried by a jury; for parcel or not parcel is matter of fact; 9 Rep. case of the Abbot of Strata Marcella, Salk. 56, 774.

The tenants holding by charter cannot be impleaded out of their manor; for if they are they may abate the writ by pleading their tenure they are free from toll for things bought and sold concerning their substance and husbandry. And they cannot be impannelled upon any inquest. F. N. B. 14. If tenants in ancient demesne are returned on juries, they may have a writ *de non pronendis in assisis*, &c. and attachment against the sheriff. 1 Rep. 105. And if they are disturbed by taking duties of toll, or by being distrained to do unaccustomed services, &c. they may have writs of *monstraverunt* to be discharged; See F. N. B. 14; New. Nat. Br. 32, 35; 4 Inst. 269.

Lands holden by this tenure are a species of copyhold, and as such preserved and exempted from the operation of the statute of Chas. 2. Yet they differ from common copyholds, principally in the privileges before-mentioned; as also they differ from freeholders, by one special mark and tincture of villenage, noted by Bracton, and remaining to this day, viz. that ancient demesne lands cannot be conveyed from man to man by the general common law conveyances of feoffment, &c., but must pass by surrender to the lord or his steward, in the manner of common copyholds, yet with this distinction, that in the surrender of these lands in ancient demesne it is not used to say "to hold at the will of the lord" in their copies, but only "to hold according to the custom of the manor." See 2 Vin. Ab. 476; 4 Com. Dig. Ancient Demesne.

2 Burr. 1046. *DUNN DEM. WROOT, v. FENN.* H. T. 1800, K. B. 3 T. R. 474.
 This was an application for permission to plead ancient demesne to an action of ejectment, which was granted after perusal of affidavits stating that fact. See Adams' on Ejectment, 245, 2d edit.

Ancient demesne pleadable in ejectment;

2. *BRITTEL v. BADE*, E. T. 1 Salk. 185; S. C. 1 Ld. Raym. 43 S. P. *PARKER v. WINCH*, M. T. 1690, K. B. 12 Mod. 13; S. C. Comb. 186.

But not where the ejectment is brought for copyhold lands;

The defendant pleaded that the land was held of the manor of D. which is ancient demesne. The plaintiff replied *quod bene et verum est* that the lands aforesaid are held *de decono et capitulo de Wigornia ut de manerio*, &c. which is ancient demesne, but that the lands are copyhold lands. The defendant rejoined *ex quo prædict*, the *cognovit* the lands to be ancient demesne, it is no matter whether they are copyhold or frank free. Plaintiff demurs. *Sed per Cur.* The replication is repugnant, for lands held *ut de manerio*, must be frank free, for copyhold lands are parcel of the manor, and cannot be held *ut de manerio*; and therefore the replication, by saying they are held *ut de manerio*, and yet they are copyhold, is repugnant.

3. *RODD v. CONINGSBY*, T. T. 1723, Ex. Bunb. 132.

Or to action where damages are recoverable.

To an action of trespass for entering the plaintiff's house, the defendant pleaded that the house was holden of his manor of Marden, and that it was an ancient demesne, and all actions, &c. ought to be tried in *curia manerii*. The plaintiff demurred. *Per Cur.* Judgment must be given for the plaintiff; for wherever damages only are to be recovered, and an action is *contra pacem* or *vi et armis* (though the title may come in question), ancient demesne cannot be pleadable.

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(C) REQUISITES OF PLEA, AND WITHIN WHAT TIME TO BE PLEADED.

1. *FARRERS v. MILLER*, E. T. 1691, K. B. 1 Show. 386; S. C. 1 Salk. 217; S. C. 12 Mod. 21; Carth. 220.

The plea of ancient demesne with out a defence is good if accepted;

To ejectment, the defendant *venit et dicit* that the land is ancient demesne without making any defence. On special demurrer. *Per Holt*, C. J. The plaintiff might have refused the plea for want of a defence; but if he receives it, he admits a defence. See *Precedents*, Petersdorff's Index, 20; *Adams*, Ejectment, 358.

2. *HATCH v. CANNON*, 1699, K. B. 3 Wils. 51.

And leave to plead it by must be obtained supported by an affidavit.

In formodon the tenant pleaded ancient demesne, without an affidavit to verify the fact; the demandant thereupon moved for, and had, a peremptory rule to plead, which the defendant moved to discharge, insisting that an affidavit was unnecessary, and cited 2 Lord Raym. 1418. *Per Cur.* An affidavit is necessary wherever you plead to the jurisdiction; and for any thing that appears, the land in question may be parcel of the manor itself, which is ancient demesne, and such lands are pleadable at common law; but if they are lands held of a manor, which is ancient demesne, then indeed they are not pleadable at common law. The peremptory rule to plead was directed to stand. See tit. Jurisdiction, Pleas to, post.

3. *DOE DEM. RUST, v. ROE*, T. T. 1759, 2 Burr. 1046. S. P. *DENN, DEM. WROOT v. FENN*, 8 T. T. 474.

The affidavit to obtain leave must state that the lands are holden of a manor which is ancient demesne. But saying that it is a reputed manor is sufficient.

The affidavit stated that the lands were holden in ancient demesne, and that they were holden of the manor of G.; but it did not proceed to allege that the manor of G. was itself holden in ancient demesne, and it was adjudged bad; for if the lands only, and not the manor, were ancient demesne, the matter could not be tried in the court of the manor; and that it was invariably necessary that such application should be accompanied by an affidavit, that the lands are holden of a manor which is ancient demesne, that there is a court of ancient demesne regularly holden, and that the claimant has a freehold interest; and the Court will refuse the motion if any of these facts be omitted in the affidavit.

4. *DOE, DEM. HENDEN, v. THOMAS*, H. T. 1743, C. P. Barnes, 185. *SMITH v. ROE*, T. T. 1733, C. P. Prac. Reg. C. P. 2.

On a motion for leave to plead ancient demesne, founded on an affidavit,

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stating that the lands were reputed to be ancient demesne. *Per Cur.* We will grant this motion, as the affidavit shows sufficient cause.

GOODTITLE, DEM. SYMONS, v. THRUSTOUT. T. T. 1746. C. P. Barnes. 187. **S. P. HOLDFAST v. CARLTON.** H. T. 1715. C. P. Ca. Prac. 43. **SMITH v. ROE.** T. T. 1733. C. P. Prac. Reg. 2. **DENN, DEM. WROOT, v. FENN. H. T.** 1800. K. B. 8 T. R. 474. **DEIGHTON v. FOSTER.** T. T. 1748. C. P. Barnes. 187. *contra.*

In ejectment, a motion was made for leave to plead ancient demesne, founded on the usual affidavit; but it appeared that it had not been made within the time prescribed by the rules of Court. *Per Cur.* This application should have been within the first four days of this term; and as the defendant has neglected to do so, the motion is made too late. *See 2 Arch. Prac. K. B. 47; 1 Tidd. 662-3; 7th edit.*

6. DOE, DEM. MORTON, v. ROE. 49 Geo. 3. H. T. 1809. 10 East. 523.

The defendant had obtained a rule nisi on a former day, why, in an action of ejectment, he should not have leave to plead that the lands specified in the declaration were holden in ancient demesne. This application was made in accordance with the rule that such a plea can only be pleaded with leave of the Court upon a proper affidavit. Cases cited for plaintiff against allowance of rule, F. N. B. 23. 25; Brittle v. Dade, Salk. 185. *Per Cur.* The affidavit that the premises were holden of A. B. as of his manors of C. in D., which manor is holden in ancient demesne; and that there is a court of ancient demesne held within the manor and suitors thereof, in which court, and before which suitors, the lessor of the plaintiff might have proceeded in ejectment; and that to the best of his belief the lessor of the plaintiff is seised in fee of the premises in the declaration mentioned, is a sufficient affidavit to admit the plea.—Rule absolute. *Vide Doe, dem Rust, v. Roe, 2 Burr. 1046.*

7. HATCH v. CANNON. 1770. C. P. 3 Wils. 51. **GOODRIGHT v. SHUFFILL.** T. T. 1726. K. B. 2 Ld. Raym. 1418.

Upon the tenant pleading ancient demesne without an affidavit to verify the fact, *Per Cur.* An affidavit is necessary whenever you plead to the jurisdiction of the Court; and if the lands are held of a manor which is ancient demesne, they are not pleadable at common law.—Peremptory rule to plead ordered. *See 1 Stra. 639; 2 id. 738; 3 B. & P. 397; 12 Mod. 123; Form of affidavit, 2 Chit. Pl. 446.*

Motion for leave to plead ancient demesne must be made within the first 4 days of the term.

But a plea of this description was permitted to be filed within 4 days, pending rule nisi for permission to file it.

(D) REPLICATION, AND SUBSEQUENT PROCEEDINGS.

1. HOPKINS v. PACE. T. T. 1690. K. B. 1 Show. 271; S. C. Comb. 183.

In ejectment; plea that the land is parcel of such a manor, which is ancient demesne, &c. Replication that the tenements in the declaration are pleadable at common law; *absque hoc* that those tenements are parcel *de antiquo dominico*. After demurrer and judgment for defendant, *Per Cur.* The traverse is ill; you ought to have traversed that the manor was ancient demesne, and that shall be tried by the Doomsday book; or else you ought to have traversed that those tenements were held of that manor. *Precedents, Petersdorff's Index, 20.*

2. KITE v. LAURY. H. T. 1694. K. B. 3 Salk. 34; S. C. 1 Salk. 56. by [616] the name of **BAKER v. WICH.**

In ejectment the defendant pleaded that the manor of Bray is ancient demesne, and that the lands in question are held of the same manor, and pleadable by writ of right close in the court of the lord of the manor. The plaintiff replied that the lands were in the parish of Bray, and were frank-fee, and pleadable at common law; and traversed that they were pleadable in the court of the manor; and upon a demurrer to this replication, it was argued that the precedents were otherwise, for it is the tenure, and not its being pleadable in the court of the manor, which is traversable, for that is but a consequent of the tenure; to which the Court inclined, saying that where ancient demesne is pleaded, in such case the party (to make a full defence) must either take issue upon it, or traverse the tenure of the manor, or that

An affidavit to verify a plea of ancient demesne is indispensable.

A replication should not traverse that the tenement, but that the manor is ancient demesne;

And the tenure is traversable, and not the being pleadable in the lord's court.

there was a fine levied, or common recovery suffered, and so rely upon the estoppel, and pray judgment whether he shall answer to it as ancient demesne, contrary to such fine or recovery. *Note.* That where ancient demesne is pleaded, the defendant must allege that the lands are held of such manor which is ancient demesne, and not that they are parcel of such manor which is ancient demesne.

3. SAVERY v. SMITH. M. T. 1696. C. P. 3 Salk. 36.

A replication of ancient demesne need not set forth a special title; And saying that the tenant is exempt from toll in all places is good. [617]

In replevin for taking his cattle, &c. the defendant made consuance for toll in Highworth market demanded of the plaintiff, which he refused to pay, and thereupon he justified the taking the cattle; the plaintiff replied that she is tenant of the manor of Hanningdon, in Wiltshire, which is ancient demesne, and that tenants of lands in ancient demesne are quit of toll in all places, &c. *Per Cur.* It is not necessary for such tenants to set forth what estates they have either in fee-simple or otherwise; it is sufficient for them to allege that *homines et tenants de antiquo dominico* ought to be discharged of toll, &c. It was afterwards objected that the plaintiff had laid this privilege too generally, and in all places, &c.; when, by law, tenants in ancient demesne are not discharged of toll, but only of such things which arise on their own lands, and which are for the support and ease of them and their families; and the reason of this is because their lands were formerly in the possession of King Edward the Confessor, or King William called the Conqueror; and therefore in the Domesday Book, which was made in the 20th year of his reign, they are called *terra Regis Edwardi*; and those in the possession of King William are called *terra regis*; and when any of these lands were aliened from the crown, the tenants were obliged by their tenure to manure the king's demesnes; and therefore to encourage them in that labour, they had the privilege to be discharged of toll of all things which did rise or grow on their own lands; but when they turned merchants and traders in other things, they are not within the reason of this privilege. *Sed per Cur.* To be quit of toll in places shall be intended of such things in all places where he is tenant. See 1 *Leon.* 231; *Cro. Eliz.* 10.

4. HOLDY v. HODGES. T. T. 1662. K. B. Sid. 147; S. C. 1 Lev. 106.

Ancient demesne is triable by the Domesday book.

In ejectment for land in Longhope, in the county of Gloucester, the issue was, whether it was ancient demesne or not; and at the trial the Domesday Book was brought in by an officer of the Exchequer, by which it appeared that Hope was ancient demesne, but nothing was mentioned of Longhope; thereupon they offered to prove, by the steward of the manor and others, that it was the same as was formerly called Hope, and had lately obtained the name of Longhope. And *Windham, J.* was for examining the witnesses;* but all the rest of the Court *contra*, and that defendant had failed of the record to prove the issue; and if the truth was as he supposed, he might have helped it, by pleading that it was known by one name as well as the other, and that Longhope and Hope were one and the same village.

Anglesea.

REX v. PARRY AND ANOTHER. Sum. Ass. 1774. 1 Leach. C. L. 108; S. C. East. P. C. 773.

Shropshire and not Cheshire is the next adjoining English county to the Isle of Anglesea, under the 26 Geo. 2. c. 12.

This was an indictment at Salop for an offence against the 26 Geo. 2. c. 19. committed in Anglesea; and the prisoners having been found guilty, it was moved in arrest of judgment, that Cheshire, and not Salop, was the next adjoining English county, and that they were improperly tried in the county of Salop. But the Court were all of opinion that the conviction was proper; that the words in the 26 G. 2. "in the next adjoining English county," being only a description of the law as it then stood, must be construed according to the 26 Hen. 8. and that they meant in the latter, as in the former statute, a county "where the king's writ runneth;" viz. that the offence should be tried

* In 1 Lev. 106. it is reported that *Windham, J.* thought it might be supplied by proof of witnesses, because this is a trial by the Court upon the book, and not by the jury; and compared it to a trial of infancy by inspection and affidavits, but *cateris e contra*, and so it was adjudged.

by an English judge and jury, and that Chester is not to be considered as an English county within either of those acts. See 2 *M. & S.* 270; 11 *East*. 370.

Animals, Injuries by and to.† See also *Cattle; Dogs; Game; Hunting; Larceny; Steel Traps and Spring Guns; Trespass.*

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I. INJURIES BY, AND REMEDY, p. 618.

II. INJURIES TO, AND REMEDY, p. 621.

1. INJURIES BY, AND REMEDY.

1. SMITH v. PELAH. H. T. K. B. N. P. 2 *Stra.* 1264.

Per Holt, C. J. If a dog has once bit a man, and the owner, having notice thereof, keeps the dog, or lets him go about, or lie at his door, an action will lie against him at the suit of a person who is bit, though it happened by such person's treading on the dog's toes, for it was occasioned by the owner not hanging the dog on the first notice, and the safety of the king's subjects ought not afterwards to be endangered. The *scienter* is the gist of this action. *Vide authorities cited in the note, and Precedents, Petersdorff's Index*, 119.

An action will lie for keeping a dog of known mischievous propensities; Or trespass will lie for mischief occasioned by permitting a dangerous animal to go at large. And if the owner knows its dangerous disposition he is bound to use every means to prevent accident.

2. LEAME v. BRAY. E. T. 1803. K. B. 3 *East*. 593.

Per Cur. If a dangerous thing is put in motion, as if a dangerous animal is let loose, and mischief ensue to any person, the owner is answerable in an action of trespass, the law in such cases presuming notice to the defendant of the mischievous propensity of such animals.

3. JONES v. PERRY. T. T. 1795. K. B. 2 *Esp.* 482. N. P.; S. C. Peake. L. Ev. 292. A dog having been bit by another that was labouring under canine madness, the owner fastened him up; but a child coming near, and irritating him, the animal flew at, and bit the child, in consequence of which the child was seized with hydrophobia and died; in an action for the expenses incurred, *Lord Kenyon, C. J.* held that the father might maintain an action, it being the duty of the owner to have prevented the dog from doing mischief immediately he became acquainted with the fact of the dog labouring under so dangerous and fatal a malady.

4. BAYNTINE v. SHARP. T. T. 1699. C. P. 1 *Lutw.* 90.

In case for keeping a mad bull, whereby the plaintiff was tossed, gored, and wounded, after a verdict for the plaintiff, the judgment was arrested, the Court being of opinion that the declaration was bad, because it did not show that the defendant knew the bull was mad.

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But the knowledge of the proprietor of its dangerous propensity must be averred.

† The general rule is, that the owner of domestic or other animals not necessarily inclined to commit mischief, as dogs, horses, and oxen, is not liable for any injury committed by them to the person, or personal property, unless it can be shown that he previously had notice of the animal's mischievous propensity, or that the injury was attributable to some other neglect on his part; it being in general necessary, in an action for an injury committed by such animals, to allege and prove the *scienter*; and though notice can be proved, yet the action must be case, and not trespass. 12 *Mod. Rep.* 333; *Ld. Raym.* 608; *Dy.* 25. pl. 162; *Cro. Car.* 254; 2 *Salk.* 662; *Bac. Abr. Action, Case; F; Lutw.* 90; *Peake, L. E.* 291-2. But if the owner himself acted illegally, he may be liable even as a trespasser, as where a person in company with his dog trespassed in a close through which there was no foot-path, and the dog, without his concurrence, killed the plaintiff's deer. 4 *Burr.* 2092; *ante*, p. 108. and 1 *Carr. N. P. Rep.*; 2 *Lev.* 172; and *Leame v. Bray. supra.* With respect to animals *mansuetæ naturæ*, as cows and sheep, as their propensity to rove is notorious, the owner is bound, at all events, to confine them on his own land; and if they escape and commit a trespass on the land of another, unless through the defect of fences, which the latter ought to repair, the owner is liable to an action of trespass, though he had no notice, in fact, of such propensity. 12 *Mod.* 235; *Lord Raym.* 606. 1583; *Dy.* 25. pl. 162; *Vin. Abr. Fences, Trespass, B.* 20 Vol. MS. 424; *Poph.* 161; *Sir W. Jones*, 131; *Latch.* 119; *Salk.* 652. But for damages by animals, &c. *feræ naturæ*, escaping from the lands of one person to those of another, as by rabbits pigeons, &c. no action can be supported, because the instant they escape from the land of the owner his property to them is determined. 5 *Co.* 104. b; *Cro. Car.* 337; 1 *Burr.* 259; *Bac. Ab. Game.* A person cannot be liable for the act of cattle unless he were the general owner; or he actually put them into the place where the injury was committed; 1 *Saund.* 27; and if a servant or a stranger, without the concurrence of the owner, chase or put his cattle into another's land, such owner is not liable; but the action must be against the servant or stranger, who, as it has been said, gains a special property in the cattle for the time. *Bro. Abr. Trespass*, pl. 435; 2 *Roll. Abr.* 553.

And that fact must be proved, nor will defendant's promising to compensate for the injury dispense with such evidence.

5. BECK AND WIFE V. DYSON. E. T. 1815. K. B. 4 Campb. 198. S. P. ANON. T. T. 1700. K. B. 12 Mod. 555.

This was an action for keeping a savage and untractable dog, which had bitten the plaintiff's wife; it appeared that the animal had been in general fastened up; no evidence was adduced that the dog had been accustomed to bite mankind, but it was shown that defendant had promised compensation. But *per Lord Ellenborough, C. J.* The plaintiff must be called; for in order to maintain this action, proof of defendant's knowledge is essential.—Plaintiff nonsuited.

6. JUDGE V. COX. E. T. 1816. 1 Stark. 285.

Showing that the dog had subsequently bitten a child is not sufficient.

In case, the declaration stated that defendant was aware that his dog was accustomed to bite mankind, and that the animal had bitten the plaintiff. It was proved that subsequent to the dog having bitten the plaintiff, he had attacked a child; but there was no evidence of his having bitten mankind before the plaintiff sustained his injury. It further appeared that the defendant had told persons to take care that the dog did not bite them. *Per Abbot, J.* In order to support this declaration, it must be proved that the dog had bitten human beings before the wrong complained of was committed, though I think it would have been sufficient to have stated in the pleadings that defendant kept a dog of a savage and ferocious disposition.

7. HARTLEY V. HARRIMAN, T. T. 1818. K. B. 1 B. & A. 620; S. C. 2 Stark. 212.

Proof that dogs had attacked men is not sufficient to support an averment in a declaration that they were used to bite and worry sheep. [620]

An action has been brought "for keeping dogs, knowing that they were accustomed to worry and kill sheep and lambs. Proof was adduced that the dogs had in more than one instance attacked men and run after sheep; but the averment in the declaration was not borne out by the evidence showing that they had ever bitten or worried any sheep, to the knowledge of the defendant. A verdict had been found for the plaintiff. A motion was now made for a new trial. *Per Cur.* If the declaration had been framed more generally, and alleged that these dogs were of a ferocious nature, and unsafe to be left at large, the evidence might have been sufficient to support it. But it being distinctly averred that they were used to bite sheep and lambs, that allegation itself must be proved. Now it does not appear from the examination of the witnesses that the dogs had that propensity, unless a dog accustomed to attack men is necessarily accustomed to attack sheep.—*Rule absolute.* See 1 Stark. 285.

8. JENKINS V. TURNER. M. T. 1696. C. P. 1 Ld. Raym. 109; S. C. 3 Salk. 13; S. C. 2 Salk. 662.

In an action for keeping a boar accustomed to bite animalia, held that the animalia was sufficiently certain after verdict. And the Court after verdict will infer that its mischievous propensities were proved on the trial.

Case *pro eo quod* the defendant *scienter retinuit quendam aprum ad mordendum et percutiendum animalia consuetum qui quidem aper*, such a day and place *percussit et memordit* a mare of the plaintiff's, of which bite she died. Plea, not guilty, and a verdict for the defendant. A motion was made in arrest of judgment, on the ground that the word *animalia* is too general and uncertain. *Per Cur.* The question is how the plaintiff in this case ought to have declared; and it seems that he ought to have particularly shown what mischief the boar had done on former occasions; and for want of that upon demurrer, it would have been ill. But now the question is if this declaration is not aided by the verdict, it being objected that the word *animalia* is too uncertain, and that the defendant could not know what evidence he must procure to defend himself at the trial; but this is no objection, for the defendant knows that no evidence can be given of any mischief done by the boar, but that of which he hath had notice. And as to the uncertainty, the judge who tried the cause knew well that this would not be actionable, unless the boar had been used to kill or bite horses, sheep, &c.; consequently if that had not been proved, he would not have permitted the jury to have given a verdict for the plaintiff. For this reason we will intend that such facts were given in evidence, and much greater uncertainties and defects have been aided by a verdict. It was then contended for the plaintiff, and these cases were cited; T. Jones, 125; 1 Sid. 233; 1 Lev. 341; 1 Keb. 781. 783.

792; that in trover, *pro catulis* generally, *Anglice* whelps, had been adjudged good after verdict; 3 Lev. 336. And in the same court *indebitatus assumpsit pro materialibus mure* was good after verdict; and as to the case of Bayntine and Sharpe, 1 Lutw. 1290. objected to by the defendant's counsel, the Court said that there was no *sciens*, and for that the defendant was not liable to the action; and the Court could not intend that it was proved at the trial, because the plaintiff has no need to prove more than is in his declaration. But in this case there is *animalia* in the declaration; it is necessary for the plaintiff to prove that the boar used to bite some animals; and then, after verdict, we will intend that they were such animals as will support the action. But there may be a difference between a boar and a dog; for it is the nature of a dog to kill animals which are *feræ natura*, as hares, cats, &c.; but it is not natural to boars to kill any thing; and therefore in the case of a dog there might have been a question whether the word *animalia* had been good in the declaration, because it might have been intended of some such animals as naturally bite and kill. But since a boar does not naturally kill any, it shall be intended as before is said; and therefore judgment for the plaintiff. See *Coup.* 826; *Stra.* 1264; *Dougl.* 658. [621]

9. BINSTAD V. BUCK. M. T. 1766. C. P. 2 Bl. Rep. 1117.

Trover for pointing dog. The plaintiff proved the animal to be his property, and that it was found at the defendant's house 12 months after it was lost. The defendant said the dog strayed there casually, and demanded 20s. for 20 weeks' keeping, before he would deliver up the dog. A verdict was given for the plaintiff, subject to the opinion of the Court whether this refusal amounted to a conversion of the dog; but the counsel for the defendant declined arguing the question, and the plaintiff had judgment. See *Nicholson v. Chapman.* 2 H. Bl. 254. A person finding & feeding a dog has no lien for its keep.

II. INJURIES TO, AND REMEDY.*

1. TOWNSEND V. WATHEN. H. T. 1808. K. B. 9 East. 277.

The defendant in this case was possessed of a certain wood situate near the premises of the plaintiff, and wrongfully intending, &c. to destroy plaintiff's dog, had placed traps in and about the wood, and near to certain public highways and footways, and near to the grounds of the plaintiff, and had placed pieces of flesh and strong smelling things in and about the said traps, and had procured to be trailed round about the traps similar attractive scents, and continued the same, &c. It appeared in evidence that the defendant had resided at his house, and procured the traps to be so placed there previous to the plaintiff's settling in the neighbourhood, and that this was continued afterwards to the prejudice of plaintiff's dogs, which were often caught in the traps, some of the traps being set so near the plaintiff's house, that the baiting might be scented by his dogs which were kept there; and there was also evidence that the defendant allowed his servant 1s. for every dog killed. After a verdict for the plaintiff a rule *nisi* was obtained to set it aside, as there was no evidence of any malicious intention against the plaintiff's dogs, or that the traps were set there for the purpose of catching dogs in general; and that this was necessary to support the action; as the traps having been set in the defendant's own ground, the dogs must have been trespassing at the time they were taken. The Court at the same time refused a rule *nisi* to arrest the judgment, which was also prayed. *Per Cur.* It is true that the traps were set in the defendant's own ground; but machines of this dangerous descrip- An action on the case lies for enticing dogs into traps set in the grounds of defendant by bail placed therein.

* An action lies for an injury to any domestic or tame animal; 1 Saund. 84. n. 2. 3; Hob. 283; Cro. Eliz. 125; Cro. Jac. 262. 463; 3 T. R. 37-8; and all animals usually marketable, as parrots, monkeys, &c.; and in which case it is not necessary to show in the pleadings that they have been reclaimed; but in the case of a hawk, pheasant, hare, rabbit, fish, or other animals, *feræ nature*, and not generally merchandizable, it should be shown in the pleadings that the same were reclaimed or dead, or at least that the plaintiff was possessed of them. So it lies in some cases for taking animals *feræ nature*, and not reclaimed, as if a hare or rabbit be killed on the land of another he, having a local property *ratione soli* in such hare or rabbit, may support trespass for taking it, though the wrong doer did not enter on the land. Vide post, tit. "Game," and see *Precedents*, Pet. Index, 119.

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A plea of justification in trespass for killing a mastiff dog, must allege that the defendant could not otherwise separate them; And a plea on the part of defendant, a game-keeper, which justifies killing a dog chasing hares, must aver that they could not otherwise have been saved, and that the dog belonged to an unqualified person. The stat. of the 43 Eliz. extends to coes given in an action of trespass for biting a dog.

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tion must not be set in a situation to invite a neighbour's dogs, and as it were to compel them by their instinct to come into the traps; and the traps in the present instance being proved to have been placed so near to the plaintiff's court yard, where his dogs were kept, they might even scent the bait without committing any trespass on defendant's wood this rule must be discharged.

Vide post, "Steel Traps and Spring Guns."

2. **WRIGHT v. RAMSCOT.** T. T. 1666. K. B. 1 Saund. 84; S. C. 1 Sid. 336.

This was an action of trespass for stabbing a mastiff dog, the property of the plaintiff. The defendant pleaded that the plaintiff permitted his dog to go unmuzzled, and that on a certain day the dog of the plaintiff run upon a dog belonging to one C. B. and bit the said dog; and that he the said defendant being servant to the said C. B. did kill the said mastiff, to prevent further mischief. On demurrer to this plea, it was argued that it was untenable, as the plea did not state that the defendant could not part or take off the mastiff from worrying the other dog, unless he killed the former. The Court, acquiescing, gave judgment for plaintiff.

3. **VERE v. LORD CAWDOR.** M. T. 1809. K. B. 11 East. 568.

By statute 22 & 23 Car. 2. c. 25. lords of manor may appoint gamekeepers who may take and seize all guns, dogs, &c. to kill game used by any person who by that act is prohibited from keeping the same. A plea on the part of defendant, a gamekeeper, justifying the killing of a dog belonging to the present plaintiff when running after hares, in a certain manner, in order to preserve the said hares, was holden bad by the Court, as the plea did not aver that the dog belonged to an unqualified person, or that it was encouraged by the defendant to pursue the game, nor was it even alleged that it was necessary to kill the dog for the preservation of the hares.

4. **DAND v. SEXTON.** H. T. 1789. K. B. 3 T. R. 37.

After verdict for the plaintiff with one shilling damages, in an action of trespass for ill-using a dog, the judge certified the damages to be under 40s. under the 43 Eliz. c. 6. a rule was obtained to set the same aside, on the ground that that act did not apply to trespass *vi et armis*; but *Per Cur.* We are of opinion that the statute extends to the present case; and the rule, on the authority of *Walker v. Smith*, 1 Wils. 93. must be discharged. *Vide 1 Hullock on Costs*, 25. 2d edit.

Ann. See tit. *Year.*

Ann. Jour, and Waste. See tit. *Year, Day, and Waste.*

Annuity.*

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(A) IN WHAT CASES, AND WITHIN WHAT TIME, TO BE ENROLLED, p. 631.

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* An annuity is thus defined, Co. Litt. 1445. n. A yearly payment of a certain sum of money granted to another in fee for life, or years, charging the person only of the grantor, for if it be payable out of lands, it is properly called a rent charge; but if both the person and the estate be made liable (as they usually are,) then it is called an annuity; hence the distinction is, that a rent charge is always a burden upon, and issuing out of lands; but an annuity is a yearly sum chargeable upon the person of the grantor; annuities and rent charges will, however, be arranged in the abridgement on as one and the same.

An annuity may be granted for the life of either the grantor or grantee, or for the lives of any other persons, or for a term of years; and is generally secured either by a bond and warrant of attorney, or by an assignment of some part of the borrower's personal property; or they charged upon some real property, in which he has only a life interest; consequently can seldom procure money, but by selling an annuity for his life. These interests commonly arise under marriage settlements, wills, or such like provisional instruments, and embrace freehold, copyhold, and leasehold estates, the dividends of stock, or money arising from any other funds.

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I. CONSTRUCTION OF GRANTS OR DEVICES OF AN ANNUITY.

1. BASAWEN AND HERLE v. COOK. M. T. 1675. C. P. 1 Mod. 223; S. C. 2 Mod. 138. If an annuity or rent

A rent charge was granted to the plaintiff's by the defendant for the life of charge be Mary Cook, *habendum* to them, their heirs, and assigns, *ad opus et usum* granted to of Mary, and in the indenture covenanted to pay the rent *ad opus et usum* B. for the Mary. The plaintiffs upon this annuity brought an action of covenant, and life of C. assign the breach in not paying the rent to themselves, *ad opus et usum* of to B to the Mary. The defendant demurs; 1st. Because the words in which the breach use of C. is assigned contain a negative pregnant. 2dly. Because the plaintiff does not the annuity must be say that the money was not paid to Mary, which would have satisfied the paid to B. Court. 3dly. That the rent charge is executed to Mary by the statute 27. and not to Hen. 8. c. 10. of uses, and she ought to have distrained for it; thereupon C.

two questions were made; 1st. Whether this remedy by action of covenant be transferred to Mary by the statute 27 Hen. 8. c. 10. of uses or not? 2dly, If not, whether the covenant were discharged? *Per Cur.* When a statute transfers an estate, it transfers together with it such remedies only as by law are incident to that estate, and not collateral ones. As the covenant is not discharged, judgment for plaintiff. *See* 3 *T. R.* 393; 9 *Co.* 61; 1 *Vent.* 175; 12 *Mod.* 45.

2. SLATER V. CAREW. T. T. 1673. C. P. 1 Mod. 187.

An annuity to a man and his wife during their two lives, divests upon the death of either of them. In action of debt on bond the condition appeared to be, that if the obligor, his heirs, executors, &c. do yearly pay to T. and D. his wife, during their two lives, that then, &c.; the husband died. Upon the question being raised whether the payment should continue to the wife or longest liver of them, it was contended that the interest of the bond is in the obligee; the husband and wife are strangers, and therefore the payment ceases upon the death of either of them. In which opinion the court concurred. *See Bradnel's case*, 5 *Co.* 9; *Hill's case*, 1 *Roll.* 112; *Raym.* 126; 11 *Mod.* 108; 2 *Ld. Raym.* 1119; 1 *And.* 151; 1 *Brownl.* 46.

3. ACHERLEY V. VERNON. E. P. 1739. C. P. Willes. 153; S. C. Com. Rep. 513; Forts. 188.

A. by will gave an annuity charge to his sister, payable half-yearly and said he gave it to her in lieu and satisfaction of all claim she might have on his real or personal estate, and upon consideration that she released her right and claim thereto to his executors and trustees; the sister lived several years without executing any release; held that the husband of the sister was not entitled to the arrears of the annuity. This was an action of debt in which a verdict was found for the plaintiff, subject to the opinion of the court on the following case. The action was brought by the plaintiff as administrator of his wife, Elizabeth Acherley, deceased, and was founded upon the statute of 32 Hen. 8. c. 37. entitled, an act for recovery of arrears of rent by the grantees of tenants in fee-simple, which extends to the administrator of tenants for life of rents, and was brought by the plaintiff for the arrears of an annuity of 200*l.* due to his wife, which had been devised to her by the will and codicil of Thomas Vernon. The case set forth, that the said Thomas Vernon, by his will, gave unto his sister Elizabeth Acherley, then the wife of Roger Acherley, an annuity or rent charge of 200*l.* a-year, to be paid to her half-yearly out of the rent and profits of his real estate, to her own hands for her separate use, exclusive of her present or any after-taking husband; and in case she shall happen to survive my wife, my will is, that the 200*l.* per annum be from the time of my wife's decease made up the sum of 400*l.* per annum during the life of my said sister, for her sole and separate use. After several other devises, legacies, and annuities, he gave and bequeathed all the rest and residue of his real and personal estate, all his debts, legacies, and expenses being first paid and satisfied, unto his brother Roger Acherley, and four other trustees, their heirs, executors, and administrators, upon special trust and consideration in them reposed, that the annuity and annual rents before devised to his wife and sister, the other persons therein for that purpose before named being first duly paid out of the rents issued and profits of his real estate whereof he should die possessed, whether freehold or leasehold, and after payment of all his debts and legacies; the said Thomas Vernon, by his codicil, ratified and confirmed his said will, except in the alteration therein mentioned, on which words the question depends; but my mind and will is, that what I have so given to my sister be by her accepted in lieu and satisfaction of all she might claim out of my real or personal estate, and upon condition that she release all right and title thereunto unto the executors and trustees in my will named; and having thus provided for my sister, I devise, &c.

Vernon died 1720; after whose death the said Roger Acherley and Elizabeth his wife, in right of the said Elizabeth, were seized of the said yearly rent devised to the said Elizabeth as aforesaid, in their demesne as of freehold, by virtue of the said gift and devise, and the defendant entered on the manor and other the lands chargeable, and was, and ever since had been, tenant of the demesne thereof. The action was brought for 1,900*l.* for nine years and an half of arrears of the said annuity of 200*l.* due in February, 1731, in the life-time of the said Elizabeth Acherley, and also in the life-time of the said Mary, the wife of Thomas Vernon; Elizabeth died in 1732, and she never

made release unto the trustees of executors, and the testators will annexed. The question which was reserved for the opinion of the Court is, whether the plaintiff, as administrator of his wife Elizabeth, is entitled to recover the arrears of this annuity, or any part thereof, his wife Elizabeth never having executed any release, either of the real and personal estate of the testator, to the executors and trustees, according to the condition in the codicil. [626]

Per Cur. The point to be decided by us depends upon these two questions; 1st. Whether it be a condition precedent or subsequent; if it be a condition precedent, the plaintiff is certainly entitled to nothing, because nothing ever vested in Elizabeth, she not having performed the condition? 2d. Supposing it to be a condition subsequent, the next question will be, whether it ought not to have been preferred in a reasonable time, or at least some time in the life of Elizabeth? In respect to both the propositions, we are to consider what was the intent of the testator; and in the next place what construction may be put on the words of the codicil, according to the rules of law and justice; and we are of opinion that the intent of the testator is plain and clear, that his sister and her daughter should have no part of his real or personal estate but what he has given them by his will and codicil; that they should accept of that as a full provision for them, and in full lieu and satisfaction of all their claims and demands whatsoever, either out of his real or personal estate; and this being his plain intent, he could never intend that his heirs, for whom he had provided in the manner stated in the will, should be at liberty to dispute the devisee's right for several years together, and also insist on payment of their annuity; he therefore certainly intended an immediate release, or at least that his sister should receive no part of the annuity until she had executed a release. This being his plain intent, we will in the next place consider whether or not such a construction can be put upon the words of the codicil, according to the rules of law, as is agreeable to the intent of the deviser. Now, we are of opinion that the words of this codicil are sufficient to create a condition precedent; the consequence is, that the plaintiff cannot recover, for this annuity is plainly granted in consideration of the release being given; so are the express words of the codicil. Nor has the devisee of Vernon any remedy to obtain such release, but by stopping the payment of the annuity; there is no pretence to say in this case that she could not perform the condition before the time of the payment of the annuity, for the first payment was not to be until six months after the testator's death, and she might as well release her right in six months as at any future period. Besides, the particular manner of penning the clause affords another very strong argument that this was intended to be a condition precedent; for all the words are in the present tense. He wills that the annuity be accepted in lieu and satisfaction, and upon condition that she release, which is just the same as if he had said, I give her the annuity, she releasing; which expression has always been holden to make a condition precedent. Having disposed of the first question, the second arises. Supposing it to be a condition subsequent, we are still of opinion that the plaintiff cannot recover, for that it ought to be performed in reasonable time; and we are inclined to think that it ought to be performed at the end of the six months, when the first payment of the annuity became due; but we are clearly of opinion that it ought to be performed before it became impossible; for to say that it has now become impossible by the act of God, and that it is therefore void as a condition subsequent, is a mere fallacy. If, indeed, it had been directed to be done on a particular day, and she had died before that day, the argument would have had great weight; but she might and ought to have performed it immediately, if she insisted upon having her annuity: and therefore it was her own laches that it was not done before, of which she shall not take advantage; to say that she had her whole life-time to perform it, it is most absurd, for then she might, contrary to the express direction of the testator, dispute the devisee's right to the estate for many years, and yet all along enjoy the benefit of her annuity. It has been said that there ought to have been a request on the other part before Mr.

Where a bond was conditioned in consideration of past cohabitation for payment of an annuity during the joint lives of the mother and 2 children, to be applied to the maintenance of herself and the children, or in case of the death of the two children, then to her during her life; and when one of the children had died, the Court held that upon the construction of the instrument, the annuity was payable at all events during the life of the mother.

A devise of an annuity for life with a direction that the annuitant shall receive no wages after the testator's death does not imply a condition that the annuitant shall continue in service. An annuity to N. P. for 21 years, if any further provision for the said N. P.; and in consideration of the great regard and esteem which the said J. B. and V. S. have for, and bear towards, the said N. P. they, the said J. B. and V. S. granted him an annuity of 500*l.* per annum, for the term of 21 years, in case they should so long live; and in the event of either of their deaths within the said term, then, if the survi-

Acherley was obliged to execute a release; but we think not; for until she demanded the annuity, they might not think it worth their while to demand a release; but it was her business to do the first act, in order to entitle herself to the annuity.

4. JAMES AND WIFE V. TALLANT, EXECUTOR, T. T. 1822, K. B. 5 B. & A. 889; S. C. 1 D. & R. 548.

The condition of a bond recited a past illicit cohabitation between A. B. and the obligor; that they had had two children, C. D. and E. F.; and that, wishing to put an end to such connexion, A. B. had applied to the obligor to make a suitable provision for herself and children, and that, to effectuate this purpose, the obligor had entered into the present bond, conditioned to pay to A. B. during the joint natural lives of the said A. B. C. D. and E. F. an annuity of 30*l.* to be applied to the maintenance and education of the children, as well as A. B.; or in case of the death of the children, during the natural life of the mother. One of the children died. The question now proposed for the opinion of the Court was, whether, under such circumstances, the annuity was payable. *Per Cur.* It has been contended by the counsel in argument, that the words "joint natural lives," used in the bond, mean the joint natural lives of the mother and both the children, and cannot be construed to mean the joint-natural lives of any two of the parties mentioned; that the first annuity, specified to be payable during the continuance of the three joint lives, is at an end; and that the second annuity is not payable, being payable only on the determination of two of the lives; and that, therefore, as one only of the children has died, the bond cannot be now put in force. But it appears to us to have been the clear intention of the obligor to provide a maintenance for the woman as well as for her two children. Taking into our consideration the whole language of the bond, we are therefore of opinion that they are not distinct annuities, nor given on condition of joint survivorship, but that so long as the mother only, or the mother and either of the children are living, the present defendant is liable to the payment of the annuity. To construe the instrument differently would be to give the mother an interest in the death of the surviving child, as until that event the annuity would not be payable. Judgment for the plaintiff.

5. MOLYNEUX V. SCOTT, T. T. 1762, K. B. 1 Bl. Rep. 376.

Testator bequeathed an annuity to W. a servant of his, and his assigns, during his life, which he charged upon lands, with a power of distress. And then, after several other bequests, he gave him all his wearing apparel; and I do hereby direct, "that the said W. shall not have any wages for his service, for the time he shall serve my son or my wife, after my death by reason of the annuity hereinbefore given him." The annuitant lived with the testator's son and widow but a short time after his death, and then left them without their consent; and they insisted that this annuity was bequeathed to him on condition that he should continue in their service without wages. But the Court of B. R. were clearly of opinion that this was not a conditional annuity, the clause only meaning that, as long as the servant elected to remain, he should not have the annuity and his wages too.

6. BARFORD, ADM'X. OF N. P. V. STUCKEY, E. T. 1823, C. P. 1 Bing. 225.

Declaration in debt by plaintiff, as administratrix of N. P. It appeared that J. S. deceased, did, in his will, give and devise to A. T. and T. S. certain messuages, &c. to hold the same unto A. T. and T. S. and their heirs, to certain uses; one V. S. and his issue being the first tenant for life, and in tail male, and one J. B. and his issue being the second tenant for life, and in tail male, and the remainder over being to the use of the said N. P. and his assigns; and whereas the said J. S. did not, in and by his said will, make any further provision for the said N. P.; and in consideration of the great regard and esteem which the said J. B. and V. S. have for, and bear towards, the said N. P. they, the said J. B. and V. S. granted him an annuity of 500*l.* per annum, for the term of 21 years, in case they should so long live; and in the event of either of their deaths within the said term, then, if the survi-

vor should so long live, and be in the actual possession of all the said settled hereditaments, and in case of his death within that time, to his child or children, as N. P. should appoint; and in default of such appointment, to all of them equally; and if no child, then to the widow during her widowhood; and that if, on the death of the said J. B. or V. S. within the said term, the survivor of them shall be in the possession of the said manors, &c. then the said annuity should be paid as before stipulated, in case such survivor should so long live; but in case the said N. P. or his heirs should, at any time during the said term, come into possession of the said manor, &c. under the limitation in the will of the said J. S. expressed or otherwise, by operation of law, that then the annuity should be utterly void, and then, in either case, the said N. P. his heirs, executors, or administrators, is or are to repay to the said J. B. and V. S. respectively, &c. all sums of money by him, the said N. P. his children, or wife, received for or on account of the said annuity; and that for the consideration aforesaid, they, the said J. B. and V. S. did thereby severally and respectively promise the said N. P. his executors and administrators, that they, the said J. B. and V. S. should and would, during the said term of 21 years, to commence as aforesaid, in case they should so long live, well and truly pay or cause to be paid to the said N. P. &c. as limited aforesaid, one annuity or clear yearly rent or sum of 500*l*. It appeared also, that N. P. died within the term, and also his only child and wife; but that, nevertheless, the present plaintiff, to whom administration had been granted of the effects of the said N. P. claimed to have the payments of the annuity continued by the defendant. *De murrer and joinder.* *Per Cur.* It has been acknowledged that this is a question of intention, to be collected from the general purview of the deed. It is also conceded that there is no particular case applicable to the present. Now what was the intention of the grantor? It is clear that he was influenced by motives of personal kindness towards the family to grant them a provision by way of annuity. By the death of N. P. and his only child, and subsequently by the death of his widow, all the events contemplated by the deed have happened, and on which this annuity, considering it as a provision for the particular family, was to terminate; and we can find no express words or particular intention carrying this annuity beyond them personally and individually, and the annuity must consequently cease. This view of the subject is confirmed by the clause for repayment of the sums received in case the grantees should come into possession of the property, and by the circumstance of there being no insertion of the usual words "executors or administrators," after the words "child or children."—Judgment for the defendants. See 1 Roll. Ab. 331; 2 Vernon. 35; 2 Wils. 75; 4 M. & S. 426; 1 B. & B. 319.

7. *COVERLEY v. BURRILL*, H. T. 1821, K. B. 5 B. & A. 257.

Per Cur. An annuity may be redeemable, but it is not necessarily so; and it is not redeemable unless there be a special provision to that effect in the deed.

An annuity is not redeemable unless there be an agreement to that effect.

II. ON WHAT PROPERTY AN ANNUITY MAY BE CHARGED.

1. *BARWICK v. READE*, E. T. 1797, C. P. 1 H. Bl. 627. S. P. *STUART v. TUCKER*, T. T. 1776, C. P. 2 W. Bl. 1137. [630]

To secure the payment of an annuity, a lieutenant in the marines had assigned his full pay in trust, to pay over the residue to himself. On a rule to show cause why the deed of assignment should not be vacated, the Court were clearly of opinion that it was contrary to the policy of the law, and derogatory to the honour and dignity of the crown, that a stipend or reward given to one man for past or future services should be transferred to another, who perhaps could not perform them. See stat. 5 & 6 Ed. 6, c. 16, s. 2 & 3; 3 Lev. 289; Willes, 571; Salk. 468; Freem. 19; 3 Plow. 391; Ca. Temp. Talb 140; 2 B. & B. 613. 678; and see Lord Kenyon's judgment in *Mowys v. Leake*, 8 T. R. 414; and 1 Geo. 4, c. 119, s. 38; 5 Geo. 4, c. 61, s. 17.

The pay of a military officer can not legally be assigned as the security for an annuity.

Under the 13 Eliz. c. 20. an annuity or rent charge by a rector, charged on his benefice is void, but that circumstance does not vacate a personal covenant.

2. *MOUYS v. LEAKE AND ANOTHER*, M. T. 1799, K. B. 8 T. R. 411.

The defendant by deed granted to the plaintiff an annuity or rent charge, issuing and payable out of a rectory, vicarage, and glebe lands; and for better securing the same, Leake, by deed, bargained and sold the said rectory, vicarage, and glebe lands, to J. M. determinable on Leake's death. Upon trust to permit Leake to receive the rents, &c. until the annuity should be arrear 21 days, and then the rents, &c. to be appropriated to the payment of the annuity, Leake further covenanted to pay the annuity, and by the same deed the other defendant covenanted to pay on Leake's default. Both the defendants executed a warrant of attorney, authorising J. M. to enter up judgment. On a rule to show cause why Leake should not be discharged out of execution, and why a deed charging the payment of the same upon benefices with cure of souls, warrant of attorney, and judgment, should not be vacated, on the ground that the grant of the annuity out of the benefices with cure of souls, is void, as well by the common and canon law as by the statute 13 Eliz. c. 20;—*Per Cur.* We are not prepared to say whether the statute 13 Eliz. c. 20. does or does not extend to this case, consequently we shall not give any judicial opinion whether or not this deed be void by that act; but we certainly think the statute contains very strong expressions. Now in this case one of the defendants executed a deed, by which he granted an annuity or rent charged out of certain benefices, which is not *malum in se*. There is nothing illegal in such a transaction, except as far as it is prohibited by the statute. If, indeed, there had been any moral turpitude mixed in it, we would have followed it through all its consequences; but a deed that was intended to operate one way, may operate another way, *ut res magis valeat quam pereat*, if integrity require it. Then why may not this deed, which was intended to operate as a rent charge upon the living, have effect as a personal security against the grantor, containing, as it did, a covenant to pay the annuity. The application to vacate the securities must be refused.

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III. OF THE MEMORIAL.*

(A) IN WHAT CASES AND WITHIN WHAT TIME TO BE ENROLLED.

1. *HAMMOND v. FOSTER*, E. T. 1734, K. B. 5 Ter. Rep. 635.

The grantor of an annuity redeemed it under a clause to that effect and received the deed from the plaintiff's attorney; soon afterwards, having occasion to borrow another sum of money, he applied to the attorney who

A re-grant of the same annuity is substantially a new transaction, and must be memorialized.

* Previously to the passing of the first annuity act, great fraud and imposition had been practiced in negotiating the sale of life annuities, which it seems were much promoted by the secrecy with which such transactions were conducted. With a view of checking these nefarious practices, the legislature passed the 17 Geo. 3. c. 26. entitled, "An act for registering the Grants of Life Annuities, and for the better protection of Infants against such Grants," (S. 1.) requires that a memorial of every deed, bond, instrument, or other assurance, whereby an annuity or rent charge shall, from and after the passing of this act, be granted for one or more life or lives, or for any term of years, or greater estate determinable on one or more life or lives, shall, within twenty days of the execution of such deed, bond, &c., be enrolled in the High Court of Chancery, and that every such memorial shall contain the day of the month, and the year, when the deed, bond, &c. bears date, and the name of all the parties, and for whom any of them are trustees, and of all the witnesses, and shall set forth the annual sum or sums to be paid, and the name of the person or persons for whose life or lives the annuity is granted, and the consideration or considerations, of granting the same, otherwise every such deed, bond, &c. shall be null and void to all intents and purposes.

(S. 2.) That before any judgment shall be entered of record, upon any warrant of attorney for recovering or securing the payment of any annuity or rent charge, that hath already been granted for one or more life or lives, or for any term of years, or greater estates determinable upon one or more life or lives; and before the execution shall be sued out, or action brought on any such judgment already entered, or on any deed, bond, &c. already executed for the purposes aforesaid, a memorial of the deed, bond, &c. shall be enrolled in the High Court of Chancery; and in case the party shall neglect to enrol the same, any such judgment execution, or proceeding in the action respectively, shall be null and void. (S. 5.) That a particular roll shall be kept by the clerks of the enrolments in Chancery, and that every memorial shall be enrolled in order of time, as it shall be brought in, and the day, hour, and time, of bringing the memorials into the officer, shall be specified on the roll. The insufficiency of the preceding act to remove effectually the mischiefs it intended to remedy, and the ambiguity or uncertainty of expression in one or two of the

informed him that he had not returned to his client that money, and that he would re-deliver to him the sum on receiving back the deeds, which the defendant assented to, and received the amount agreed upon. There was a memorial of the first transaction, but not of the second; on an application to set aside the annuity. *Per Cur.* This is substantially a new transaction, and there ought to have been a memorial of the second grant.—Rule withdrawn. [632]

2. GARROOD v. SAUNDERS, M. T. 1795, K. B. 6 T. R. 403.

To secure an annuity, the defendant assigned a lease, and gave a bond and warrant of attorney; the same were registered, but not within the time prescribed by the act; afterwards the defendant, for a valuable consideration, sold his interest in the above lease to R. D. and absconded; R. D. obtained a rule to show cause why these documents should not be set aside, because they were not enrolled within the time directed by the annuity act. *Per Cur.* The first section of the annuity act clearly renders the deed inoperative.—But the rule was discharged on other grounds. If the memorial of annuity be not enrolled within the time prescribed by that statute, it is void.

3. EX PARTE FALLON AND WIFE, T. T. 1793, K. B. 5 T. R. 283. [633]

An annuity was granted on the 6th of June, and a proper memorial of it was sections, being calculated to promote litigation and disquisition, the legislature, was induced to pass the stat. 53 Geo. 3. c. 141: which after reciting that it was expedient that the antecedent statute should be repealed, and other provisions substituted in lieu thereof, save and except so far as regards any annuities, or rent charges, which have been granted before the passing of the present act. Sec. 2. enacts, that within 30 days after the execution of every deed, bond, instrument, or other assurance, whereby any annuity or rent charge shall, from and after the passing of this act be granted for one or more life or lives, or for any term of years, or greater estate determinable on one or more life or lives, a memorial of the date of every such deed, bond, instrument, or other assurance, of the names of all of the witnesses thereto, and of the person or persons for whose life or lives such annuity or rent charge shall be granted, and of the person or persons by whom the same is to be beneficially received; the pecuniary consideration or considerations for granting the same, and the annual sum or sums to be paid, shall be enrolled in the High Court of Chancery, in the form or to the effect following, with such alterations therein as the nature of any particular case may reasonably require:— The days are computed exclusive of the day on which the deeds are executed.

Date of instrument.	Names of instruments.	Names of parties.	Names of witnesses.	Name or names of person or persons by whom annuity or rent charge to be beneficially received.	Person or persons for whose life or lives the annuity or rent charge is granted.	Consideration and how paid.	Amount of annuity or rent charge.
9th and 10th Aug. 1813.	Indentures of lease and release.	A. B. of one part. C. E. of the other part.	E. F. of G. H. of	C. D.	A. B.	100l. paid in money, 500l. paid in notes of the governor and company of the Bank of England, or other notes or bills of exchange as the case may be.	100l. a-year.
Same date.	Bond in penalty of 1200l.	A. B. to C. D.	E. F. G. H.	For securing the same annuity or rent charge.			
Same date.	Warrant of attorney to confess judgment on the same bond.	A. B. to I. K. and L. M. at torneys of the King's Bench.	E. F. G. H.				

otherwise every such deed, bond, instrument, or other assurance, shall be null and void, to all intents and purposes. Sec. 3. Provided always, and be it further enacted, that if any such annuity shall be granted, by, or to, or for the benefit of any company, exceeding in number ten persons, which company shall be formed for the purpose of granting or purchasing annuities, it shall be sufficient, in any such memorial, to describe such company by the usual firm or name of trade.

enrolled on the 26th of the same month, a rule was obtained to show cause why the security and warrant of attorney should not be set aside, on the ground that the memorial was not registered within the time prescribed by the act; the words of the statute being that the instrument shall, within 20 days of the execution, be enrolled. *Sed per Cur.* To say that the words in the 17 Geo. 3. c. 26. mean 20 days all inclusive, would be a strained interpretation of the act; the clear meaning being 20 days exclusive of the day of execution.

4. CRESPIGNY V. WITTENNOON AND ANOTHER, T. T. 1792, K. B. 4 T. R. 790.
 An annuity in consideration of relinquishing a business, B. and C. in consideration of A.'s relinquishing his business, covenanted to pay him the annual sum of 400*l.* during his life. On an action of covenant being brought for non-payment of the annuity, it was pleaded that no memorial had been enrolled, pursuant to the 17 Geo. 3. c. 26. General demurrer. *Per Cur.* It is manifest, from the different clauses of the act, that the legislature did not intend that there should be any memorial of an annuity similar to the grant now under discussion. The sections in the act of parliament all apply to money considerations. Here either the annuity was absolutely void because not granted either for money or notes (and then no memorial of it could be made), or it was an annuity of which a memorial could not be enrolled according to the act. But it is too much to say that the annuity is void in itself; and we think that neither the spirit nor the words of the act require that a memorial of such an annuity should be enrolled.—Judgment for the plaintiff.

5. HUTTON V. LEWIS, CLERK, AND OTHERS, T. T. 1794, K. B. 5 T. R. 639.
 Or a school need not be registered. The master of an academy agreed to relinquish his situation, house, furniture, and fixtures, for the value of the goods, &c. to the defendant, who agreed to pay to the plaintiff, his executors, &c. during the lives of the plaintiff and his wife, a certain sum per annum, and another sum, the moiety of the entrance money paid on the admission of every scholar. In an action on the bond, judgment was suffered by default; and the question was whether the annuity should not have been registered. *Per Cur.* We are of opinion that this annuity not being granted in consideration of money, but of resigning the grantee's situation, it is not within the act—Rule refused.

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 But if A. entitled to dividends on stock, grant an annuity payable thereout to B. who assigns it to C. there
6. HUDSON V. SKINNER, H. T. 1796, K. B. 6 T. R. 596.
 C. negotiated with the plaintiff for an annuity secured by the defendant to the plaintiff on certain dividends of bank stock in trust for the defendant for life; the plaintiff then assigned the same to C. in consideration of 160*l.* On a rule being obtained to set aside this annuity, it was objected that no memorial had been registered, and that it was not within the exception in the 8th sect. 17th Geo. 3. which provides that the act shall not extend to any annuity infor-
 * The 8th section 17 Geo. 3. excepts from the act any annuity or rent charge, given by will or marriage settlement, or for the advancement of a child; any annuity or rent charge must be an secured upon lands of equal or greater annual value, whereof the grantor was seized in fee actual trans simple, or fee tail in possession, at the time of the grant, or secured by the actual transfer fer of the of stock, in any of the public funds, the dividends whereof are of equal or greater annual stock from value than the said annuity; any voluntary annuity granted without regard to pecuniary B. to C. to consideration; any annuity or rent charge granted by any body corporate, or any authority or trust executed by act of parliament; and any annuity where the sum to be paid does not exceed 10*l.* annually, unless there be more than one such annuity from the same grantor or grantors, to, or in trust for the same person or persons.

The 10th section 53 Geo. 3. contains the following clause: And be it further enacted, that this act shall not extend to Scotland or Ireland, nor to any annuity or rent charge given by will, or by marriage settlement, or for the advancement of a child, nor any annuity or rent charge secured upon freehold or copyhold, or customary lands in Great Britain or Ireland, or in any of his Majesty's possessions beyond the seas, of equal or greater annual value than the said annuity, over any other annuity, and the interest of any principal sum charged or secured thereon, of which the grantor had notice at the time of the grant, whereof the grantor is seized in fee simple or fee tail in possession, or the fee simple whereof is possession the grantor is enabled to charge at the time of the grant, or secured by the actual transfer of stock in any one of the public funds, the dividends whereof are of equal or greater annual value than the said annuity, nor to any voluntary annuity or rent charge, granted without regard to pecuniary consideration or money's worth; nor to any annuity or rent charge granted by any body corporate, or under any authority or trust created by act of parliament.

secured by the actual transfer of stock in any public funds, the dividends whereof are of equal or greater value than the annuity. The Court were decidedly of opinion that unless there had been an actual transfer of the stock, a memorial was requisite. See *S. P. Hood v. Barlton*, 2 Ves. jun. 29; 4 Bro. C. C. 121.

7. *HALESEY V. HALESE, BART. AND ANOTHER*, E. T. 1797, K. B. 7 T. R. 194.

A. and B. who had a joint power of appointment of the fee, granted to the plaintiff an annuity during their joint lives, and the life of the survivor, and as a security gave him a bond and warrant of attorney; and they executed an indenture, by which they granted and demised both moieties of the estates to J. H. for 99 years, in trust for the plaintiff. A memorial of these deeds was enrolled within the time limited; but a rule was obtained to show cause why they should not be set aside upon a suggestion of some defect in the memorial. *Per Cur.* It is incumbent upon us to decide according to the strict letter of the act of parliament, which does not extend to any annuity secured by lands of equal or greater annual value whereof the grantor is seised in fee simple or fee tail. Now had not the grantor such an estate? Was not the act of conveyance which they executed competent to charge the real estate? This case, therefore, clearly comes within the fair meaning of the exception in the act of parliament.—Rule discharged.

An annuity granted under a joint power, where the parties have the disposition of the fee, with in the exception of the annuity

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8. *DIXON V. BIRCH AND TYTE*, E. T. 1894, C. P. 2 H. Bl. 307.

The defendant granted an annuity to the plaintiff, who afterwards assigned it to one C. On an objection being taken that there was no memorial of the assignment, it appeared there was a memorial of the original indenture, and *Per Cur.* As the object of the statute was to protect the grantor, it is unnecessary to enrol the assignment. See *Bromley v. Greathhead*, Hunt. 188; 4 Bro. C. C. 297.

A memorial once enrolled need not, upon assignment, be enrolled again.

9. *EX PARTE MITCHELL, CLERK*, H. T. 1802, K. B. 2 East, 137.

Per Cur. By the 8th section of the statute 17 Geo. 3. c. 26. any annuity secured upon lands of equal or greater annual value whereof the grantor is seised in fee simple or fee tail in possession at the time of the grant, is exempted from the operation of that act. It has been, however, urged that the present annuity should be memorialized, as it is also secured upon leasehold property. But the objection is groundless; the object of the framers of the statute was to guard against fraud in cases where the grantor might be necessitous, and thereby induced to become a party to an improvident bargain. And if the legislature thought that they might with safety except out of the general rule certain cases where the annuity was charged upon freehold lands, under the impression that such individuals were able to enter into fair contracts, there cannot, in construing the act, be any reason to require such annuity to be enrolled, merely because it is (besides being secured upon freehold property of adequate value) charged upon the additional security of leasehold property.

Where an annuity is secured on lands in fee of equal annual value, as well as on leasehold property, it need not be registered merely because the leasehold is included with the freehold in the same deed.

10. *O'CALLAGAN, EXECUTOR OF STOPFORD, V. SIR JOHN INGLEBY*, M. T. 1807, K. B. 9 East, 135.

It appeared that the present defendant had conveyed to certain parties, estates in Yorkshire, of which he was tenant for life, to hold to those parties, their executors, administrators, and assigns, for 99 years, if the present defendant should so long live; upon trust to raise such sums of money as they should be able, by granting annuities for the life of the defendant not exceeding 2500*l.* per ann. It also appeared that the defendant and the other parties executed a deed, granting an annuity to the testator of the present plaintiff, reciting the former conveyance in trust. This action was brought to recover certain arrears of the annuity. It was objected by the defendant that although a memorial of the deed granting the annuity had been enrolled in pursuance of the stat. 17 Geo. 3. c. 26. the annuity was null and void for want of a memorial of the deed of trust, upon the security of which the money had been advanced, and the annuity accepted. *Per Cur.* It is not necessary to enrol a memorial of the trust deed. The words used in the statute 17 Geo. 3.

Where trust deeds were executed to raise money by the grant of annuities, and afterwards an annuity was granted by a deed reciting the prior conveyance to the trustees the

Court held it unnecessary to enrol a memorial of the trust deed. c. 26. are "deed, instrument, or assurance, whereby any annuity is granted." This conveyance in trust is not, however a deed whereby an annuity is granted. It has only the effect of conveying the estates to certain parties, who afterwards grant the annuity to the plaintiff. The act only requires the enrolment of such deeds as form the grant or assurance of the particular annuity, and not of such as constitute the title of the grantor.

[636] 11. HENDERSON AND ANOTHER v. THE COUNTESS OF GLENCAIRN, H. T. 1810, C. P. 2 Taunt. 235.

An annuity bond assigned as security for another or of less amount need not be registered. A rule nisi had been obtained to set aside the judgment and execution which had been obtained and issued in an action for the payment of an annuity, and to restore the money levied, &c. The grounds of obtaining the rule were these: It appeared that by a bond, dated 1781, A. B. had become bound to pay to the defendant an annuity of 300*l.*; that the defendant had in 1803 granted an annuity of 100*l.* to the plaintiffs, and as a collateral security had assigned A. B.'s bond. It also appeared that the original memorial of A. B.'s bond contained no statement of its being obligatory on his heirs, executors, &c. for the payment of the annuity of 300*l.*; and that the plaintiff's memorial was framed upon similar defective principles. *Per Cur.* The defective description of this memorial on the part of the plaintiff cannot affect the defendant's liability. It was unnecessary to have enrolled A. B.'s at all. It was no assurance of the annuity. It only assured the property on which the annuity was subsequently raised. Besides, the registration is directed by the stat. 17 Geo. 3. c. 26. to be within 20 days.* Now how could the plaintiff, taking an annuity in 1803, enrol a bond given in 1781, within 20 days after its execution? The memorial being unnecessary, a defective memorial will not hurt, and the rule must be therefore discharged. See 9 East, 135; 10 id. 123; 11 id. 134.

The memorial of the annuity secured upon mortgage lands in fee of greater annual value than the interest of the mortgage, and the annuity, need not be enrolled under the 17 G. 3. c. 26. the exception of the 8th section in eluding equitable as well as legal estates.

[537] 12. AMHURST v. SKYNNER, E. T. 1810, K. B. 12 East, 263. S. P. CUMMING v. TWYSDEN, K. B. 12 East, 272. n. a. In replevin it appeared the plaintiff had granted an annuity to the defendant, secured upon lands which the plaintiff had long before the grant of the annuity held in fee simple, but had conveyed by way of mortgage, subject to a proviso of redemption. No memorial had been enrolled. The lands were at the time of the grant of greater annual value than the annuity and the interest payable on the mortgage. It also appeared that the plaintiff was, at the time of the grant, in actual possession of a part of the premises of greater annual value than the annuity. The question now agitated was whether a memorial was requisite under the stat. 17 Geo. 3. c. 26. § 8. *Per Cur.* There is no difference between legal and equitable estates in the construction of the 8th clause of the annuity act, and we are bound by former decision. See 2 Bro. Ch. Ca. 263; 7 T. R. 194.

The Court finding the memorial of an annuity correct when produced before them, will not allow evidence to be received to prove that it had been incor- rectly enrolled for a time but had been some years afterwards corrected. 13. GARRICK v. WILLIAMS AND OTHERS, E. T. 1811, C. P. 3 Taunt. 540. This was a motion to set aside a warrant of attorney and judgment given for securing an annuity, for want of a memorial being enrolled in due time. It appeared that when a copy of the record of the memorial was applied for at the enrolment office (and upon which this motion, supported by affidavit, was founded.) it did not contain certain formalities necessary to be observed to constitute a due compliance with the annuity act. But upon a subsequent inspection of the roll, it appeared that it had been altered, and these omissions rectified. These defects had subsisted for more than four years after the execution of the deeds and other instruments. *Per Cur.* The stat. of 17 Geo. 3. c. 26. requires that the memorials shall be enrolled in order of time as the same shall be brought into the office. If the act of parliament requires that the enrolment shall be made and completed within twenty days, and never to be altered, it requires an impossibility; for supposing that to be the construction of the statute, an annuitant who might happen to carry his memorial on the 20th day, and find only one clerk in the office, who had 500 previous

* The period of enrolment was enlarged to 30 days by the last annuity act, 53 Geo. 3. c. 141, Vide ante, 621.

memorials then to be enrolled, would be deprived of his annuity. As the record is now correct, we must therefore rest satisfied, and receive no evidence of any allegation to show that the date is incorrect. Whenever the alteration in the enrolment took place, it has relation back to the time of leaving the memorial in the office.—Rule discharged. See 4 Rep. 71; Owen, 132; 1 Leon. 582.

14. GARRICK V. WILLIAMS AND OTHERS, E. T. 1811, C. P. 3 Taunt. 540.

It appeared that the officer of the enrolment office had altered the memorial of the annuity mentioned in the preceding case, so as to rectify certain omissions, four years after the deeds and other instruments for the securing that annuity had been executed. *Per Cur.* The conduct of the officer in altering the enrolment without the consent of the Court of Chancery is highly reprehensible.

15. BRADFORD V. BURLAND AND ANOTHER, T. T. 1811, K. B. 14 East, 544-5-6.

Semb. that if a fine be levied upon certain lands as a security for the payment of an annuity at the time of enrolling the memorial, it becomes a material security, within the words of the stat. 17 Geo. 3. c. 26. "the deed, bond, instrument, or other assurance," and must be memorialized. See 4 T. R. 824; 3 Bro. Ch. Cas. 598; and post.

16. BOOTH V. DRUCE, H. T. 1812, C. P. 4 Taunt. 252.

A proviso for redemption of an annuity had been memorialized. It appeared, however, that after the different deeds had been executed, and the memorial of the transaction had been enrolled, the plaintiff had signed an agreement as follows: "I who have this day purchased an annuity of 69*l.* for 500*l.* redeemable for 500*l.* at one month's notice, hereby agree that it may be redeemed by instalments of 100*l.* at a time." This agreement was not enrolled, and it was now moved to set aside the warrant of attorney given to secure the annuity on account of such defect. *Per Cur.* The application is untenable. The original transaction was at an end, and choate. This subsequent agreement need not therefore be memorialized. The cases which have required any agreement entered into after the completion of the purchase of the annuity to be enrolled, have been decided upon the fact of its having been found to form a component part of the original transaction.—Rule discharged.

17. *EX PARTE* CAROLINE MACKENZIE, E. T. 1812, C. P. 4 Taunt. 323.

For further securing an annuity the grantor Mackenzie was required to make her will, and to make an affidavit that she would never revoke it. The parties afterwards went, with the affidavit prepared, to a magistrate in order to swear it. The magistrate reprobated the transaction, and refused to let the grantor swear it. The grantor, however, retained the will in his possession. The memorial, when enrolled, did not notice the will. *Per Cur.* A will was a very improper security to guarantee the payment of the annuity. It might have been revoked, by the grantor at any time. As long, however, as it remain unrevoked, it was an additional security, and should have been memorialized. This is a case of an uncommon description; and if the attorney of the grantor were alive, he ought to pay all the costs, and indemnify the annuitant, on account of his misconduct, against all the loss she has sustained in consequence of it.

18. SANDILANDS AND OTHERS, EXECUTORS OF HOWDEN, V. MARSH, T. T. 1814, K. B. 2 B. & A. 673.

The defendant was navy agent to the plaintiff. A letter was written by the defendant's partner in the following terms: "I have an advantageous mode of employing your profits in the stocks by annuity, secured on property, the receipts of which will be guaranteed by our house, for which we should expect a commission of 5 per cent." &c. The annuity was purchased; and after having been paid for about two years, became in arrear. It was contended, on the part of the defendant, that this guarantee was a security which ought to have been enrolled under the provisions of the annuity act. *Per Cur.* The

morialize, it was held that the annuity was void.

Where a party is connected with the grantor, and for a separate consideration guarantee the payment of an annuity, it was held not an assurance to be enrolled under the stat. 27 Geo. 3. c. 26.

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Where the consideration of an annuity was stated on the face of the bond to be love and natural affection to the grantor's mother and it appeared she had sold her trade and applied the money to place out her son in business, it was held that it could not be considered as a pecuniary consideration, rendering it necessary to enrol the security, in compliance with the stat. 17 Geo. 3. c. 26. It was held not requisite, under the stat. 53 Geo. 3. c. 141 that a bond created

statute intends that every security given by the grantor, or on his behalf, and for which the money received by him is the consideration, must be memorialized, which provisions were intended for the benefit of the grantor only, in order to show the extent of his responsibility. But the consideration for this promise is wholly distinct from that given for the annuity. Besides, the guarantee was given, not at the instance of the grantor, but of the grantees. It does not appear that the grantor had any knowledge of it. The present undertaking is not at all identified with the grantor, but wholly unconnected with his interest. There is therefore no necessity that there should be an enrolment.

19. KEATS v. HICK, E. T. 1821, K. B. 5 Moore, 629.

An annuity had been granted by one A. B. to the present plaintiff, in consideration of the natural love and affection which he had for the plaintiff, his mother, and for the purpose of making some provisions for her support and maintenance. An action of debt on the annuity bond was brought against the defendant, as surety; who pleaded that he was not liable, as the plaintiff had carried on a certain trade, and sold such trade at the request of her son, and that the money arising therefrom, together with certain other money she possessed, was advanced to her son to place him in business, and that in consideration thereof the present annuity was granted, and that no memorial was enrolled, according to the statute 17 Geo. 3. c. 26. thereby vacating the annuity. Replication, traversing the fact of such being the consideration of the annuity. The plea was supported by an affidavit of the plaintiff, upon which the Court of King's Bench had been lately moved against the defendant's solicitor, to deliver up the bond in question, stating the facts, similar to what were disclosed in the plea. It having been left to the jury to say whether the consideration was purely pecuniary, and therefore rendering a memorial necessary, a verdict had been found for the defendant with liberty for the plaintiff to move to enter up judgment notwithstanding, which was now done on the ground that as the consideration of the annuity was the plaintiff's resigning her business to her son, it was not necessary that the memorial should be enrolled; and that as the money stated to be arising therefrom, was indefinite and uncertain, it was not a pecuniary consideration within the meaning of the act. *Per Cur.* The consideration for which this annuity was granted was, in point of fact, not only the relinquishment of the plaintiff's trade for the natural love and affection she might bear to her son, but also an advancement of whatever money she possessed at the time of the annuity being granted. The substance of the transactions between the parties, however, was clearly the resigning her trade in favour of her son; and although there was an advance of money, it was only collateral to, and with a view of forwarding that object. The pecuniary consideration is therefore only incidental, and not the substantive cause for which the annuity was granted. But independently of this, we find ourselves bound by former decisions, which have all established that to bring an annuity within the act the consideration must be money only; This rule must be therefore made absolute. Rule absolute. See 4 T. R. 792; 5 id. 639.

20. JAMES v. JAMES, E. T. 1821, C. P. 2 B. & B. 702; S. C. 5 Moore, 479; S. P. HARRISON v. SMITHIRINGALE, E. T. 2821, C. P. 5 Moore, 481; S. C. 2 B. & P. 704.

The plaintiff being entitled to a life interest in certain veins of coal, assigned his interest to the defendant, in consideration of an annuity. It was objected that no memorial was registered according to the 53 Geo. 3. c. 141. *Per Cur.* By the second section of that act, every memorial of an annuity enrolled must specify "the pecuniary consideration for granting the same," and by the 10th section of same act it is enacted that the statutes shall not extend to any voluntary annuity granted without regard "to pecuniary consideration or moneys' worth." But taking both these sections together, we are of opinion that the statute does not extend to cases of fair and bona fide sales of landed property, when the consideration in part or in whole is an

annuity to be paid to the vendor. The present case, therefore, comes within this rule of construction. ing an annuity should be assigned such interest to the grantor, as a consideration for the annuity.

21. DARWIN V. LINCOLN AND LOCK, H. T. 1822, K. B. 5 B. & A. 444. [640]

It appeared, that for the better securing the payment of certain annuities granted by Lincoln, one of the defendants, the plaintiff joined with him in certain securities to the grantee. The bond then recited that he did so as surety only for Lincoln, and that the premises chargeable with the payment of the annuity were the sole property of the plaintiff. It also appeared that Lock, the other defendant, agreed to enter in a joint and several bond to the plaintiff, conditioned for the annuity of the payment by Lincoln, and in case of default, that both the defendants should save harmless the plaintiff. Plea to declaration on the indemnity bond, that the memorial was insufficient in not stating a clause whereby Lincoln and the plaintiff were at liberty to purchase the annuity upon certain conditions. Replication, that the annuity, at the time of granting thereof, was secured upon certain premises of equal or greater annual value than the said annuity, and of which the plaintiff, then being one of the grantors of the said annuity, was then seised in fee simple in possession. A verdict had been found for the plaintiff. A motion was now made to arrest the judgment, on the ground that the plaintiff was alleged in the pleadings to be the grantor of the annuity, whereas it appeared from the deed that he was a mere surety. A surety to an annuity deed who conveyed his own freehold on a lease of greater value than the annuity, in trust to secure the payment of the same, is a grantor within the 17 G. 3. c. 26. If the memorial of an annuity state a general trust, and deeds to secure the same when one of the securities contains certain restriction, the memorial cannot be supported.

Per Cur. Although the statute of 17 Geo. 3. c. 26. only uses the word "grantor" in the 10th section of the act, it would be a forced construction of the clause to confine the term to persons for whose use the annuity was granted. The plaintiff has made his estate liable to the payment of the annuity, and can never redeem it without paying the whole of the money which was advanced as the consideration for the annuity, and he is therefore a grantor entitled to the protection of the excepting clause of the annuity act; no memorial was consequently requisite, and the rule must be discharged.—Rule discharged. See 12 East, 263.

(B) GENERAL REQUISITES.

1. TAYLOR V. JOHNSON, E. T. 1799, K. B. 8 T. R. 184.

The memorial of annuity stated generally that certain estates for years were put in trust for the grantee; but when the deed was produced, it appeared that the receipts of the premises were to be placed in the hands of the trustee, in case of any default in payment of the annuity by the defendant. The objection to this memorial, was, that it did not state the conveyance according to the terms of the deed. The question was raised in an action of replevin. [641] Where the memorial of an annuity referred to the annuity deed, & stated it to be redeemable "on such notice, terms, and conditions, as are therein expressed," the Court set aside the annuity on the ground that the memorial should have distinctly specified the terms and condition of redemption.

Per Cur. The act of parliament requires the memorial to state all the trusts contained in the deeds for securing the annuity, as well those which are introduced for the benefit of the grantor as for those for the benefit of the grantee.—Rule absolute.

2. EX PARTE ANSELL, T. T. 1797, C. P. 1 B. & P. 62.

An annuity deed contained a proviso for redemption. The memorial stated it as follows: "And in the same indenture is contained a certain proviso or agreement, empowering the said C. Ansell to repurchase the said annuity upon such notice, terms, and conditions, as are therein expressed." It was now moved to set aside the bond, warrant of attorney, and the deed creating the annuity, on account of the proviso for redemption being set out in such general terms. *Per Cur.* We must look to what the legislature have expressly required to be inserted in the memorial, and from the declaration of the annuity act, judge also of the intention of the framers; now the statute requires a full and clear statement of the consideration. This proviso is a part of the consideration. Every circumstance in favour of the grantor is a part of the consideration, for these stipulations often constitute the foundation of the grant. If, then, the proviso is to be taken notice of at all, it ought not to be stated in this general way, but taken notice of substantially. The terms

The memo-
rial of an
annuity is
correct if
the express
terms of the
stat. 17 G.
3. c. 26. are
complied
with.
A memori-
al in which
the period
of issuing
execution
was only
stated by
reference
to the deed
was held in-
sufficient.
[642]
A deed de-
scribing an
annuity as
redeemable
upon six
months' no-
tice, ending
on one of
the stipula-
ted days of
payment,
cannot be
enrolled as
a power to
redeem at a
ny time on
six months'
notice.
The sched-
ule of the
stat. 53 G.
3. c. 141.
does not re-
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memorial
of an annu-
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that it was
redeemable
or to speci-
fy the name
of a person
for whom a
warrant of
attorney is
executed.

The name
of the per-
son who
pays the
considera-
tion must
be inserted.
[643]

and conditions of redemption ought to be specifically set forth in the memorial, in order that the grantor may be enabled, without any trouble or difficulty, to be apprized of the nature and extent of the agreement he has entered into. The words "on the terms therein expressed," are not sufficient, and the rule must be therefore made absolute.—Rule absolute. Eyre, C. J. dissentient. See 6 T. R. 737; 7 id. 205, 250.

3. HORWOOD AND ANOTHER, EXECUTORS OF COARE, v. UNDERHILL, E. T. 1812, Exchequer Chamber 4 Taunt. 345. Reversing the judgment in the Court of King's Bench, T. T. 1808, 10 East, 122.

Per Cur. To render a memorial of annuity good, as being conformable to the requisition of the stat. 17 G. 3. c. 26. it is only necessary to comply with what is required by the express terms of the act. *Sed vide dictum per Lord Ellenborough*, Cook v. Jones, 15 East, 242.

4. ORTON v. KNIGHT, E. T. 1802, C. P. 3 B. & P. 153. S. P. CUNNINGHAM v. MACKENZIE, M. T. 1801, C. P. 2 B. & P. 598.

A motion was made to set aside a judgment which had been obtained in an action for an annuity, on the ground that it appeared by a certain indenture, entered into between the respective parties to the annuity transaction, that execution should not be issued upon the present judgment, but that it should only remain as a collateral security until 21 days after the stipulation of payment, whereas this default was only stated in the memorial by words of reference to the deed. *Per Cur.* The objection is fatal.—Rule absolute. See 6 T. R. 205, 737; 8 B. & P. 62.

5. TRINGHAM v. BETHUNE, E. T. 1817, C. P. 7 Taunt. 429.

Per Cur. The proviso in the deed creating the annuity is, "that if the grantor should at any time hereafter be desirous of re-purchasing the annuity, and shall give the grantee six calendar months' notice in writing, at any of the stated times for paying the annuity, of such his desire, then, &c. The memorial enrolled states it thus, "that if the grantor be desirous to re-purchase the annuity, it shall be lawful for him so to do, upon giving six months' notice in writing of such his intention." There is, therefore, a material difference in the two statements; the proviso in the deed requiring six months' notice terminating on one of the half yearly days of payment, and the memorial describing the notice as terminable at any time. The variance is fatal.

6. YEMS v. SMITH, M. T. 1819, K. B. 3 B. & A. 206. APPLEBY v. SMITH, H. T. 1796, Ex. 3 Anst. 865. *contra*.

The memorial of an annuity was objected to, as having omitted to state a clause for the redemption of the annuity, and to specify in the recital of a warrant of attorney the name of the party to whom such warrant of attorney was granted. *Per Cur.* Neither of the objections preferred can prevail. It has been contended, that the clause rendering the annuity redeemable, is part of the consideration, and therefore ought to have been specified; but the consideration meant by the statute was obviously a consideration which can be paid. The second objection is equally groundless. The schedule, on the contrary, states that the mode of enrolling the warrant of attorney to be thus—"A. B. to C. D. and E. F. attorneys," &c.

(C) PARTICULARS TO BE STATED IN THE MEMORIAL.

1st. WITH REFERENCE TO DESCRIBING THE PARTIES AND THEIR RESPECTIVE INTERESTS.

(a) Names of the parties.

DALMER v. BARNARD, E. T. 1797, K. B. 7 T. R. 248. S. P. VAUN v. ADSELL, 1 B. & P. 224; 7 T. R. 248; DENN, DEM. DOLMAN, v. DOLMAN, T. T. 1794, K. B. 5 T. R. 641. GLASSE v. MOUNT, M. T. 1797, K. B. 7 T. R. 390.

The defendant had agreed to become security with W. for the payment of an annuity. The purchase money was paid to W. by H. who acted as the agent for the plaintiff. The memorial stated, that the consideration was advanced, and paid by or for the plaintiff in promissory notes of the Bank of

England, &c. On a rule to show cause why the bond, warrant of attorney, and all other assurances, given for securing the annuity should not be vacated, the principal objection was, that the consideration money had been untruly stated in the securities to have been paid by the plaintiff, whereas it was in fact paid by H. for plaintiff, and ought to have been so described. *Per Cur.* By the third section of the act, the deed is declared to be void, unless the names of the agent and principal are inserted. The names of both should be set forth, when the person actually paying the money pays it on account of some other person. In this case, the warrant of attorney is invalid, and cannot be the foundation of a judgment.—Rule absolute for vacating the warrant of attorney and judgment; but discharged as to the deed. See the Duke of Bolton v. Williams, 2 Ves. jun. 154; 5 Br. Chan. Ca. 309; 1 T. R. 190.

(b) *Interest of the parties.*

1. DENN, DEM. DOLMAN v. DOLMAN, T. T. 1794, K. B. 5 T. R. 641.

By an indenture between A. (who was entitled to certain estates for life,) of the first part, B. of the second part, and C. of the third part, in consideration of 226*l.* paid by B. to a third person, at the request, and for a debt of A., and of 113*l.* paid by B. at the like request of C., "in trust for the person thereafter expressed; A. granted an annuity to B. to be issuing out of the estate for ninety-nine years, if A. should so long live, and demised the same estates to C. for ninety-nine years; if C., &c. upon trust to apply the rents first in payment of B.'s annuity, then to pay A. himself 40*l.* per annum, then to retain 1*s.* in the pound on the moneys received, and afterwards to pay 150*l.* and 14*l.* to two creditors of A., and the residue in discharge of A.'s debts, and the ultimate overplus to A. A memorial of this deed was registered, and (among other things) set forth the sum of 113*l.* (the latter part of the consideration) as paid by B. at A.'s request to C., in trust, as therein-mentioned; and it is stated, that A. demised the premises to C. for ninety-nine years, if, &c. upon the trusts therein mentioned. It was contended that the transaction was not vitiated by the omission to state in the memorial the ulterior trusts of the term after providing for A's annuity, because no part of the transaction relating to the annuity was suppressed. On the other side it was urged, that the annuity act requires that the memorial should contain not only the name of the grantee, but of the persons of whom any grantee is a trustee; and that the memorial was too general, for it only set forth that the payments were made upon the trusts "therein-mentioned;" and that either of these objections was alone sufficient to avoid the deed. And the Court decided, that the words of the act were positive, and all the trusts should be set forth in the memorial, and therefore held that the whole of the deed was void. See 8 T. R. 184.

All the trusts must be set forth; it is not sufficient to state that certain premises were conveyed "upon the trust there in mention ed."

But where the memorial alleged "that the parties executed a deed," &c. by which the plaintiff [643]

2. TOLDEROY v. ALLAN, H. T. 1791, K. B. 5 T. R. 480.

A. by deed demised to B. certain manors, &c. in reversion, expectant on the death of A.'s father, for 100 years, upon trust for better securing the payment of an annuity of 300*l.* which A. granted to B. by bond and judgment of equal date. In the memorial it was alleged, that the parties executed the above deed, &c. by which the plaintiff demised to the defendant as above, upon trust, as therein-mentioned. And upon further trust, that in case the said annuity of 300*l.* should be unpaid for 21 days, B. might receive the same out of the rent and profits. It appeared, however, by the plaintiff's affidavit, that there was no other trust, and that he had purchased the whole annuity for himself, and not as a trustee for any other person, though he had since assigned one moiety. It was objected that the plaintiff had not complied with the annuity act, because the memorial did not disclose the trusts of the deed according to the first section. *Sed per Cur.* The objection is totally untenable, it is negatived by the fact that there was no other trust but that set forth in the memorial. The legislature never intended to require the parties to mention all the trusts which were alien on the estate independently of the annuity, but only those trusts which were created in consequence of the annuity being granted.

demised to the defendant a certain estate for years upon trust, in case the said annuity, or any part thereof should be unpaid, &c. and it was shown by the plaintiff's affidavit, that there was no other trust held sufficient;

But a provision that an additional sum should be paid on the grantor doing any act that would require a larger premium to be paid on a policy on his life must be stated.

Where the memorial of an annuity described a party as a trustee nominated on the part of the grantee," and it appeared that he had been created a trustee of certain lands for the grant of the annuity, until default of payment; and in case of such default for 60 days was invested with powers to [645] raise the annuity by lease sale, &c. of such lands, which trusts not being stated in the memorial, it was held sufficient. So where certain lands to secure an annuity were conveyed to a trustee upon similar trusts, and the memorial described the deed in cause of default mere

3. CUMMING v. ISAAC, E. T. 1799, K. B. 8 T. R. 183.

An annuity deed contained this restrictive clause, that if the grantee should do any act that would occasion the grantee any extra expense as to the insurance, that the extra expenses should be paid by the trustee, to whom a certain annuity had been assigned for that purpose. A rule was obtained to show cause why the securities given to secure this annuity should not be set aside, the memorial not containing any notice of the preceding clause. The Court were of opinion that the memorial could not be supported, as it ought to have stated the particular clause, the annuitant deriving an additional benefit under it, and it forming part of the *res gestæ*.—Rule absolute. See 17 Geo. 3. c. 26. s. 1; 6 East. 243; 5 T. R. 480.

4. ASKEW v. MACRETH, In Error, H. T. 1805, House of Lords, 1 N. R. 214. S. P. BRADFORD v. BURLAND, K. B. 14 East, 446.

This was a writ of error in action of replevin, to which the defendant in the court below had made cognizance, and justified the taking of the goods, &c. mentioned in the declaration, as bailiff to the Duke of Queensbury, in order to obtain the payment of an annuity which had been granted to the said Duke, as appeared from an indenture made between the said defendant, J. M. the said Duke of Queensbury, and T. C.; which, after reciting that the said Duke had contracted with the said defendant and J. M. for the purchase of an annuity, witnessed that they, the said defendant and J. M., according to their respective estates, rights, and interests, conveyed certain premises unto the said T. C. and his heirs, upon trust; that the said Duke might take the said annuity out of the same premises, and might distrain for the same thereon; in case default should be made in payment of any part thereof for 21 days, and if the annuity should be in arrear 40 days, he might enter on the same premises, and receive the profits thereof, until all the arrears of the said annuity should be satisfied; and upon trust, to permit and suffer the persons entitled to the freehold of the same premises to receive the profits of the same to their own use, until default should happen to be made in due payment of the said annuity; but upon trust, that in default of the payment of the said annuity for 60 days, the said T. C. might, out of the profits of the same premises, or by sale, lease, or mortgage of the same, raise and levy sufficient to pay the arrears, costs, and charges, and permit the person entitled to the freehold to receive and take the overplus of the profits. The memorial stated T. C. to be "a trustee nominated on the part of the grantee; but did not set out any of the trusts. *Per Cur.* It is not stated in the memorial for whom T. C. is a trustee, so as to satisfy the statute, or does it state that T. C. was trustee for the grantor till default of payment, or for the persons entitled to the freehold of the premises for the residue of the money for discharging the arrears of the annuity.

5. DESENFANS v. O'BRYEN, E. T. 1803, K. B. 3 East, 559.

It appeared that the defendant granted an annuity to the plaintiff, and gave a bond and warrant of attorney to secure the same; and also executed an indenture, whereby the defendant assigned to a trustee certain premises "upon trust, to permit the defendant to receive the rents and profits of the premises to his own use, until default made in the payment of the annuity;" and in case the annuity should be in arrear for 60 days, that the trustee might then enter upon the premises assigned, and should raise sufficient to satisfy the arrears of the annuity, &c.; and should pay to, or otherwise permit and suffer the defendant from time to time to take and receive the overplus.

The memorial stated the indenture thus "in which said indenture are contained the usual powers of entry, and distress and perception, of the rents and profits of the said premises."

It was contended that this memorial was defective, in not setting out the trusts of the several deeds. *Per Cur.* The memorial has wholly omitted the last mentioned trust in favour of the grantee, and is therefore insufficient. See 1 B. & P. 62; 5 T. R. 480. 641; 7 id. 495. 540; 8 id. 184.

6. *DEFARIA v. STUART*, H. T. 1810. C. P. 2 Taunt. 225. S. P. *DEFARIA v. STUART*, Exchequer. 2 Taunt. 234. n.

A rule nisi had been obtained to set aside a judgment in an action for the arrears of an annuity, on the ground of a defect in the memorial. It appeared that the memorial stated the bond and condition in the following terms: that the plaintiff had contracted with the defendant for the purchase of an annuity for the life of the defendant. The memorial then went on to set out the warrant of attorney; and then stated, that by an indenture made between the defendant of the first part, the plaintiff of the second part, and J. H. of L. banker of the third part, the grant of the said annuity had been made to be payable out of all the manor therein described, and to be paid at the days and times of the said bond mentioned. And by the said indenture, the defendant, for the better securing the payment of the said annuity, and in consideration of 10s. to him paid by J. H., did sell and demise unto J. H., his executors, &c. all those manors, &c. and premises before charged, with payment of the said annuity, to hold the same to J. H. and the executors, &c. from the day next before the day of the date thereof, for the term of 99 years, in trust, with such power, and in such manner as were particularly mentioned, expressed, and declared, concerning the same.

The grounds in support of the present application were these; that it was not sufficient; that this memorial set out the trusts, so that the Court might infer for whom the party was trustee; but that the *cestui que* trust should have been expressly named, and also that it was not expressly alleged that the party was trustee for no other person. *Per Cur.* It sufficiently appears [646] for whom J. H. was trustee. As far as we can judge from the memorial, no one could hesitate to say that he was trustee for the plaintiff. As to the other objection, that it is not expressly asserted that he is trustee for no other person, the act does not require the memorial to disaffirm all other trusts, or to set out all the trusts of the annuity deed. The rule which has been obtained must be therefore discharged.—Rule discharged. See 1 N. R. 215; 6 T. R. 480, 641; 1 B. & P. 62; 9 East. 150.

mer as were particularly expressed in the deed. The Court held it sufficient, without expressly stating who was the *cestui que* trust and that it was not necessary to set out the different trusts of the annuity deed, or to negative the existence of other trusts.

7. *BROWNE v. ROSE*, E. T. 1815. C. P. 6 Taunt. 124; S. C. 1 Marsh. 478. So where the memorial of an annuity under the 17 G. 3. c. 26. in reciting the indenture, states "that for the better securing This case is not distinguishable from the case of *Defarai v. Sturt*.* It was objected there, that certain powers, and the manner in which they were granted, did not sufficiently appear; but the Court asked a question, which may with equal reason be put here. Can any one who has read this deed hesitate to say who is the *cestui que* trust? It has been contended, that there may be other trusts in the indenture besides those that are stated in the memorial; but if there are, it is incumbent on those who wish to impeach the memorial, to show their existence. It is that which constitutes the memorial, to show their existence. It is that which constitutes the distinction between this case and that of *Leycester v. Lockwood*,† which has been so much relied on; for in the latter case it appeared to the Court, from the pleadings, that there were other trusts created by the deed which ought to have been inserted.

8. *LEYCESTER AND OTHERS v. LOCKWOOD*, T. T. 1813. K. B. 1 M. & S. 527. Judgment affirmed. 5 Taunt. 587.

This was an action of covenant for non-payment of an annuity. It appeared that A. B. having agreed for the sale of two annuities to the plaintiff, sufficient.

* 2 Taunt. 225. ante, 645.

† 1 M. & S. 537. post, 647.

amounting to 140*l.* to be secured on the interests of two several sums of 4000*l.* and 6000*l.* vested in C. D. and the defendant's trustees; they the said C. D. and the defendant, covenanted with the plaintiffs to pay the said annuity out of the interest of the said several sums of money. It appeared, however, that by the annuity deed, the defendant and C. D. were not made grantors of the annuity, nor did they assign their interest to the plaintiff, but only covenanted to pay the annuity; but it was thereon that A. B. conveyed all his property in the interest of the two several sums of 6000*l.* and 4000*l.* to the plaintiff's upon the following trusts; "to hold the same in trust for A. B. until default in payment of the annuity; and after default, in trust to retain thereout the arrears and expenses incurred by reason of the non-payment; and after retaining the same, then upon trust that they should pay the residue to A. B., or such person as he should appoint." The objection which was taken to the plaintiff's right to recover, was on account of a defect in the memorial. After the memorial had set out the bond and warrant of attorney, it proceeded to state the indenture declared upon; and after stating the parties thereto, and the grant of the annuity, it went on thus; "which said annuity is, by the said indenture, farther secured, by and out of the interest and annual produce of two several principal sums of 6000*l.* and 4000*l.* secured by the several mortgages in the said indenture recited and described, &c.; and which interest, or annual produce, is and are by the said indenture, assigned and conveyed unto the said plaintiff, upon the trust thereby described." *Per Cur.* If trusts be created in an annuity deed, the terms and provisions of such trusts must be set forth in the memorial; and as in the present case, where a trust to secure an annuity is created in favor of the grantee himself, although it is derived through the medium of a third person, it is, notwithstanding a trust, and should be memorialized. The words used, "upon the trusts thereby described," are insufficient; and the fact of the grantor not having had the legal estate in the interest of the 10,000*l.* at the time of his conveyance to the grantees, and the fact of the trustees not joining in conveying their interest to the grantees, make no difference.—Judgment for the defendant. See 1 N. R. 214; 3 East. 559; 14 East. 445, 461; 2 Taunt. 225; 5 T. R. 641; 8 T. R. 184.*

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9. BARBER V. GAMSON. 11. T. 1821. K. B. 4 B. & A. 281.

The annuity was objected to in this case, because the memorial stated that it had been granted for the lives of four persons whose names were mentioned; whereas it appeared from the deed, that the annuity had been created for 99 years, determinable on lives; and it was also urged as an objection, that no description of the *cestui que vies* by residence or otherwise was stated in the memorial, nor whether the annuity was granted for their joint lives, or that of the survivor. *Per Cur.* No such description is described by the schedule of the 53 Geo. 3. c. 141. If it had been intended, the statute would have distinctly specified it.

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2dly. WITH REFERENCE TO DESCRIBING THE SECURITIES.

(a) Statement of the grant and terms of the annuity.

1. STEADMAN V. PURCHASE AND COX. T. T. 1796. K. B. 6 T. R. 737.

An annuity deed contained the following endorsement: that on the treaty for the purchase of the annuity it is agreed that the grantor shall be at liberty

* In *Bleamire v. Barford*, 6 Taunt. 511. the counsel in argument cited this case of *Leycester v. Lockwood*. and said, that Lord Ellenborough had there held that the memorial was bad, because it did not state all the trusts declared respecting the sum of 10,000*l.* and the Court of Exchequer Chamber, upon error brought, had unanimously confirmed that opinion. The Court, however, denied this, and said that the judgment of the Exchequer Chamber did not coincide with the judgment of the Court below in all its particulars. The Court of Error state that their judgment proceeds on the general ground, that all had not been done in the memorial which was required, and they point out the particular circumstances in which they coincide with the Court of King's Bench; they proceed mainly on the ground that the defendant and C. D. were by the assignment become trustees for securing the annuity, and that it was not expressed in the memorial for whom they were trustees, but they do not go to the whole extent of the judgment of the Court below.

to repurchase the same on terms; the documents were properly registered but no mention was made in the memorial of the endorsement on the deed. Upon judgment being entered upon the warrant of attorney, an application was made to set aside the judgment and the annuity deeds, because the endorsement on the indenture was not registered as well as the deed itself. *Per Cur.* We are not prepared to say whether we have a general summary of jurisdiction under the act, it being a question of great importance; but we are of opinion that we possess the power in this case, because we have a summary jurisdiction over the judgment by reason of the warrant of attorney. The insertion of the memorandum in the memorial was indispensable.—Rule absolute.

2. HARRIS V. STAPLETON, E. T. 1797, K. B. 7 T. R. 205.

A rule was obtained to set aside a judgment on a warrant of attorney given as a security for an annuity, on the ground that a redemption clause mentioned in the deed had not been memorialized. *Per Cur.* We shall abide by the decision of *Steadman v. Purchase*, 6 T. R. 737, which is in point; consequently the rule must be made absolute. *Vide ante*, 642, *contra*.

(b) Statement of the power of distress and entry.

1. O'CALLOGAN, EXECUTOR OF STOPFORD, V. SIR JOHN INGILBY, M. T. 1807, K. B. 9 East, 135.

Per Cur. It has been objected that the plaintiff, in this action to recover the arrears of an annuity, is not entitled to recover, as the memorial has not set forth the power which the plaintiffs had by deed of entering and distraining in case of any arrears accruing due. This objection is, however, answered by the fact of the memorial stating "with powers of distress and entry as stated in the deed." It is, however, unnecessary, as far as relates to any compliance with the annuity act, to state such powers of distress and entry, except so far as they create such a trust as brings them within the branch of the act relating to trustees. It has been also urged as an objection that the covenants of the present defendant, and of certain parties appointed as trustees for the purchase of the annuity, are not stated in the memorial; but that being completely unnecessary, that objection also fails. The plaintiff is therefore entitled to recover.

2. BRADFORD V. BURLAND, WIDOW, AND BURLAND, CLERK, T. T. 1811, K. B. 14 East, 446. S. P. DESENFANS V. O'BRYAN, E. T. 1803, K. B. 2 East, 562.

The memorial of an annuity witnessed that in consideration of 2,400*l.* paid by J. B. to W. B. and A. B. his wife. A. B. for himself and his wife, and also A. B. for herself, had by indenture granted, &c. to J. B. during the life of A. B. an annuity of 400*l.* payable quarterly, at the times, places, manner, and form therein mentioned, "with the usual powers of distress and entry, into, over, and upon certain hereditaments therein particularly described for the better securing the due and punctual payment of the same annuity." The defendant raised the following objection to this memorial; that it only stated that the annuity was secured "by the usual powers of distress and entry," without setting out what such powers were. *Per Cur.* It is alleged that the annuity was secured "by the usual powers of distress and entry," but it does not appear that there is any usual form of such powers. They vary according to the practice of different conveyancers. The objection raised is therefore valid.

(c) Statement of the estate charged.

1. O'CALLOGAN, EXECUTORS OF STOPFORD, V. SIR JOHN INGILBY, M. T. 1807, K. B. 9 East, 135.

Per Cur. The annuity act does not require that the estates charged with the annuity should be expressly set forth in the memorial. The memorial in this case in fact states the annuity to be charged on, and issuing and payable out of all the estates of Sir John Ingilby, in the county of York, and all the other the premises of Sir John Ingilby conveyed to certain trustees. Yet if

[illegible]

prove fatal, we think that the statute 53 Geo. 3, c. 141. which requires the nature of the instrument given for securing the annuity to be set forth in the memorial is sufficiently complied with, as in common parlance the nature of the instrument was correctly inserted; the word assignment including an underlease in the ordinary and popular acceptance of the term. See 5 B. & A. 1717; 1 Bing. 45.

(d) *Statement of the surrender and admittance to a copyhold estate.*

DOE, DEM. NAYLOR, v. STEPHENS, E. T. 1814, Ex. 1 Price, 38.

After verdict in ejectment, it appeared that an annuity had been charged on certain freehold and copyhold estates. A rule was obtained to show cause why a new trial should not be granted, the memorial being defective in not stating the admittance to, as well as surrender of the copyholds. *Per Cur.* The objection cannot be supported. The first and primary end sought to be attained by the legislature, was to give notoriety to transactions of this description. Now here every person may perceive by the memorial that there has been a surrender, and that the surrenderee must have a right to be admitted; we are of opinion that upon the face of the memorial it is valid, and no ground has been shown for a new trial. Rule discharged. See *Sherson v. Oxlade*, 4 T. R. 824.

(e) *Statement of covenant to ensure the premises.*

BLEAMIRE v. BARFOOT, E. T. 1816, C. P. 6 Taunt. 504; S. C. 2 Marsh. 204.

The memorial of an annuity, after fully stating the trust for securing its due payment, proceeded to set forth a certain covenant on the part of the grantor, "that during the continuance of the annuity thereby secured, the messuage thereby assigned, (for securing the same) should at all time be kept insured at the cost and charges of the grantor, and that if at any time during that annuity he should neglect to insure or keep insured the same, it should be lawful for the grantee to insure the same; and whatever money should from time to time be so advanced by the grantee for the purpose of such insurance should be charged upon the said messuage: and it should be lawful for the grantee to raise and satisfy to himself all such sums so advanced, in the same manner as he is thereby authorised to raise and satisfy the said annuity by virtue of the trust aforesaid." This covenant was thus stated in the memorial: "that the grantor would insure and keep insured the said demised premises, and in default thereof that it should be lawful for the grantee to insure and keep the same insured as therein mentioned." It was urged that the memorial was defective, inasmuch as by the operation of this covenant on the part of the grantor, something further was added to the original trusts, which were only for the securing of the annuity; and that this additional trust was not sufficiently set forth. *Per Cur.* The statute only requires that the memorial shall state the names of all the parties, and for whom any of them are trustees. The memorial does so, and sets out the trusts as far as relates to securing the annuity and recovering the arrears; but does not in terms set forth the covenant for insurance to its full extent. The name of the trustee, and for whom the party was trustee, and the objects of the trust are, however, sufficiently apparent. The memorial is therefore valid, and the rule must be discharged. See 5 T. R. 480, 643; 8 id. 184, 416; 3 East, 559; 9 id. 150; 14 id. 445; 1 B. & P. 62; 3 id. 153; 1 N. R. 214; 1 M. & S. 533; 2 Taunt. 534.

(f) *Statement of a fine.*

BRADFORD v. BURLAND, WIDOW, and BURLAND, CLERK, T. T. 1811, K. B. 14 East. 446.

It appeared that W. B. covenanted for himself, and his wife, with E. B. that they (the grantors) should as of Hilary term then last past, or before the end of Easter term then next ensuing the date of the indenture, levy a fine *sur concessum* with proclamations of certain lands belonging to A. B. for a term of 99 years, &c. and that the fine should enure to the use of one E. B. for the term of 99 years as aforesaid, but upon certain trusts, and for the intents thereby declared. In Easter term a fine *sur concessum*, &c. was levied in C. P.

Stating that copyhold was surrendered without alleging an admittance, is sufficient. The memorial of an annuity, which, after fully setting out the trusts for securing the same, stated a covenant on the part of the grantor (to insure the premises on which the annuity was secured) and in default of his so doing, that the grantee might in the same manner as he is thereby authorised to raise and satisfy the said annuity by virtue of the trust aforesaid. [652] raise the money upon the said premises in the same manner as the annuity itself in the following terms: "that the grantor would insure and keep insured the said demised premises, and in default thereof that it should be lawful for the grantee to insure and keep the same insured as therein mentioned." was held sufficient. Where a fine was levied upon cer-

tain lands of the lands demised. The memorial of this indenture witnessed that they, as a security for the payment of an annuity it was held necessary that the memorial should be accurate as to the time of its being levied; and should show the estate of which the fine was levied, and to whom the same belonged.

[653] Bonds given as a collateral security must be memorialized. Where a bond to secure an annuity was joint as well as several, and the memorial described it as several only, the variance was holden fatal. Where the memorial of an annuity stated that the defendant, and others became bound by a bond to the grantee without expressing whether such bond was joint or several,

[654] the uncertainty may be supplied by a subsequent part of the memorial, setting out an

of the lands demised. The memorial of this indenture witnessed that they, W. B. and wife, would, at their proper costs, &c. levy as of Hilary term then and now last past, or before the end of Easter term then and now next ensuing, unto E. B. a fine *sur concessum* &c. with proclamations, &c. of the lands, &c. before mentioned; which fine it was thereby declared should endure to the use, of E. B. for the said term of 99 years as aforesaid, upon the trusts and for the purposes hereinbefore mentioned. The memorial also contained the statement of a fine *sur concessum*, &c. levied as of Hilary term now last past, pursuant to the covenant in the said indenture, wherein E. B. was plaintiff, and W. B. and his wife were defendants. The following objections were taken to this memorial, viz. that it did not state the fine truly; the fine being in fact of Easter term, and the memorial stating it to be of Hilary term 1800; and also that it did not specify the estate or premises of which the fine was levied, or to whom the same belongs: and the Court held them to be tenable objections.

(g) *Statement of a bond.*

17 ROSHER v. HURDIS, T. T. 1794, K. B. 5 T. R. 678.

To secure the regular payment of this annuity, A. B. had given, as a collateral security, his bond and warrant of attorney. In action against the grantor he pleaded that no memorial of the warrant of attorney given by A. B. had been enrolled within the time directed by the annuity act, or of the bond containing the names of the witnesses. To these pleas the defendant demurred generally, and *Per Cur.* If we were to hold that such an instrument as the present need not be memorialized, it would be defeating the wise provisions of the legislature, and opening a door to great fraud; the names of nominal parties would be introduced as grantors, and the actual securities concealed from the public.

2. WILLEY v. CAWTHORNE, E. T. 1801, K. B. 1 East, 398.

This was a declaration on a bond in the penal sum of 150*l.* given to secure an annuity. It was objected, on demurrer, that there was a variance between the bond in question (which was a joint and several bond given to secure an annuity) and the memorial of the bond registered under the annuity act (which was of a several bond only.) *Per Cur.* The intention of the stat. 17 Geo. 3, c. 26, was to oblige the defendant to give a strict and accurate description in the memorial of the real situation of the parties, and the nature of the remedies which the grantee had for the payment of the annuity. But that has not been done in the present instance. The memorial only shows that the obligors may be sued severally, whereas the obligation was joint as well as several. The variance is material.—Judgment for defendant.

3. COARE v. GIBLETT, E. T. 1803, K. B. 3 East, 461. S. P. COARE v. GIBLETT, T. T. 1803, K. B. 4 id. 85. S. P. HORWOOD v. UNDERHILL, T. T. 1808, K. B. 10 id. 123.*

This was an action on a bond conditioned for the payment of an annuity, by which bond it appeared that the defendant and others had jointly and severally bound themselves for the payment of the annuity. It was now urged that the memorial of the bond, which was as follows, was insufficient; "A memorial of a bond whereby the said defendant and others became bound unto the said plaintiff conditioned for the payment of the said annuity." It appeared, however, that the memorial, in setting out another bond, recited the bond in question, and stated that the said defendant, &c. thereby became jointly and severally bound. It was on these grounds contended that the bond was void, as it was only stated that the defendant, &c. became bound, without expressing that they were jointly and severally bound; and that the omission was not aided by the fact of a subsequent recital of this bond (in the memorial) setting it out as a joint and several instrument. *Per Cur.* We are undoubtedly at liberty to supply from a recital in another deed set forth in one part of the memorial what is defectively stated or omitted in the statement of

* This case was reversed on error in the Exchequer Chamber in all other points that were advanced, except as to the one now in question. See 4 Taunt. 346.

another part; and therefore taking the whole bond together, it appears that the first bond mentioned was a joint and several security. This is distinguishable from the case of *Wiley v. Cawthorne*, 1 East. 398, where it was stated that the obligors became severally bound, whereas they were bound both jointly and severally. In the latter case there was a deception in the memorial. In the present case there is no appearance of deceit or intention to mislead. The judgment must consequently be given for the plaintiff. See 1 B. & P. 461; 4 T. R. 494. 500; 6 id. 335.

4. *COARE v. GIBLETT*, E. T. 1803. K. B. 3 East. 461.

Upon the supposed defect in the memorial as stated in the preceding case being urged as an objection to the plaintiff's recovering upon the bond, Le Blanc J. said "supposing the first part of the memorial contained a defective statement of the bond (which I am by no means prepared to say, supposing the question to have turned on that) yet admitting it to be defective, it is supplied by the subsequent part."

5. *HORWOOD AND ANOTHER, EXECUTORS OF COARE v. UNDERHILL*, E. T. 1812. Exchequer Chamber. 4 Taunt. 346. S. P. *JACKSON v. MILSINTON*, E. T. 1815. C. P. 6 Taunt. 189; S. C. 1 Marsh. 533. Reversing the judgment of the Court of King's Bench T. T. 1808. 10 East. 122. *DENNE v. DUPUIS*, E. T. 1809. K. B. 11 id. 134. *PURLING v. PARKHURST*, H. T. 1810. C. P. 2 Taunt. 237.

Upon a writ of error brought to reverse a judgment of the Court of King's Bench, in an action for the arrears of an annuity, it appeared that the defendant had bound himself, his heirs, executors, and administrators, in the penal sum of 2800*l.* conditioned to secure to the plaintiff's testator an annuity of 155*l.* 11*s.* 1*d.* A memorial of the bond had been enrolled, which only alleged the defendant to be bound, without stating "his heirs executors or administrators." Judgment had been given for the defendant, on account of that omission. *Per Cur.* The Court of King's Bench had decided that the plaintiff was not entitled to recover; and whether that opinion is or is not erroneous, depends upon the stat. 17 Geo. 3. c. 26. The principal evils which that act intended to remedy, were the great fraud and imposition which had been practiced in negotiating the sale of annuities, which it seems were much promoted by the secrecy with which such transactions were conducted. The legislature have therefore required a great many particulars to be stated; but no part of the act has rendered it necessary that the memorial should show the extent to which the instrument was binding. The object which the statutes had in view, would not be aided by requiring such a degree of minuteness. The publicity intended to be given by registering a full history of the different transactions with reference to granting annuities would not be increased by inserting such a statement as is now suggested to be necessary. The judgment of the Court of King's Bench must be therefore reversed.

6. *JACKSON v. MILSINTON*, E. T. 1815. C. P. 6 Taunt. 189; S. C. 1 Marsh. 533.

It was contended that the memorial of an annuity, which stated the deeds to have been executed on or about the 14th of May did not state with sufficient certainty the date of these instruments. *Per Cur.* If the bonds had not been executed on that day, the false description would have been fatal; but as that day was the real date of the instruments, the words "or about" may be rejected as surplusage.

7. *RANGER v. THE EARL OF CHESTERFIELD*, E. T. 1816. K. B. 5 M. & S. 2.

Per Cur. It is unnecessary that the memorial of this bond, and warrant of attorney to secure this annuity, should specify for whose life the annuity is granted; as it appears from the enrolment of the bond that the annuity was granted during the Earl of Chesterfield's life. It is a sufficient compliance with the statute of 17 Geo. 3. c. 26 § 1. to set forth the indenture which shows that the other two instruments exist. The act did not intend that each separate deed should be specially set forth. The memorial of the bond sufficiently identifies the annuity with that for which the bond and warrant of attorney are given. See 4 T. R. 500.

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(h) *Statement of a warrant of attorney.*

1. *HOPKINS v. WALLER*, M. T. 1791. K. B. 4 T. R. 463. S. P. DAVIDSON
v. LORD FOLEY. M. T. 1791. C. P. 2 H. Bl. 12.

Prior to the passing of the 17 Geo. 3. c. 26. an annuity was effected, and the judgment of the warrant of attorney was entered up. On a rule to show cause why the judgment should not be set aside, it appeared that there was a memorial of the bond and judgment, but not of the warrant of attorney.

Per Cur. The warrant of attorney ought to have been registered; the meaning of the legislature was, that every instrument by which an annuity is secured should be inserted in the memorial. The words of the act being clear and unequivocal, that every deed, bond, instrument, or other assurance, shall be, &c. therefore it is impossible to say that a warrant of attorney does not fall within one of these descriptions.—Rule absolute.

2. *BROWNE v. ROSE*. E. T. 1815. C. P. 6 Taunt. 124; S. C. 1 Marsh. 478.

Per Cur. The name of the attorneys authorized to enter up judgment on a warrant of attorney given to secure an annuity, need not be stated in the memorial. The statute enacts that the names of all the parties shall be inserted; but it is impossible, by any construction, to say that the legislature meant to comprehend the attorneys who enter up judgment under the description of parties.

an annuity should state the names of the attorneys who are authorized to enter up judgment on the warrant of attorney.

3. *JACKSON v. LORD MILSINGTON*, E. T. 1815. C. P. 6 Taunt. 189; S. C. 1 Marsh. 533.

It was objected that the memorial of this annuity did not state the defeasance of a warrant of attorney, stipulating for a stay of execution in case of punctual payment. It appeared that the defeasance was thus stated in the memorial: "and it is by the said indenture declared and agreed, that the said bond and warrant of attorney, and the judgment to be entered up by virtue thereof, and also this indenture, were respectively given for securing one and the name annuity; and that no execution should be taken out on the said judgment, until the annuity should be in arrear for 40 days." *Per Cur.* The case of *ex parte Ansel*, 1 B. & P. 65. requires that the defeasance should be stated in the memorial; but it does not go so far as to say that a statement by way of recital, is not sufficient. Without laying down any general rule to govern cases not exactly similar to the present; we think that it would be monstrous to set aside the annuity.

4. *DOE, DEM. MASON, AND OTHERS, v. PHILLIPS*, M. T. 1816. K. B. 5. M. & S. 369.

An indenture to secure the due and punctual payment of an annuity authorized judgment to be entered up against the defendant in case of default of payment; but it contained a proviso that no execution should be taken out upon the said judgment until the annuity should be in arrear for the space of forty days after some or one of the days appointed for payment. This proviso was not noticed in the memorial, on which ground it was urged that that instrument was invalid. *Per Cur.* The cases of *ex parte Ansell*, 1 B. & P. 62. and *Orton v. Knight*, 3 id. 153. which have been quoted by counsel, were all decided before the case of *Horwood v. Underhill*, 4 Taunt. 346. which decided that it was not necessary to insert in the memorial and covenants, unless they modify the grant itself. The proviso introduced in this deed need not be therefore stated in the memorial. It does not modify the terms of the grant, but is only a qualification of the extent of the remedy. The cases cited were also adjudged when the annuity act was looked upon as a remedial law, without attention being paid to its penal consequences. For both these reasons we think it unnecessary that the proviso should have been enrolled.—Judgment for the plaintiffs. See 8 T. R. 411.

5. *BARBER v. GAMSON*. H. T. 1821. K. B. 4 B. & A. 281.

It was submitted that the memorial in the present case was insufficient; as it did not mention the penal sum for which the warrant of attorney given as a security, authorized a confession of judgment. *Per Cur.* Whilst the stat.

17 Geo. 3. c. 26. existed, there were no means by which the grantor of an annuity could ascertain the different facts connected with the annuity, except by searching at the enrolment office. The required information may be, now however, easily obtained, as the 5th section of the 53 Geo. 2. c. 141. gives a power of obtaining copies of all such deeds or instruments as the present judgment is to be entered upon. There is therefore no reason to induce us to lend an ear to the present application.

6. *YEMS v. SMITH*, M. T. 1819, K. B. 3 B. & A. 205.

On a motion to set aside a judgment entered upon a warrant of attorney, to secure an annuity, it was objected that the memorial, in describing the warrant of attorney, had omitted to state the name of the party to whom that security had been given. *Per Cur.* The schedule in the act of 53 Geo. 3. c. 141. points out the nature of the description to be adopted; it says A. B. to C. D. and E. F. attorneys, &c.; it does not contain any regulations as to the insertion of the name of the party in whose favour that security is given.

(i) *Statement of the Judgment.*

1. *SHERSON v. ORLADE*, T. T. 1792, K. B. 4 T. R. 824.

Judgment had been entered up on a bond and warrant of attorney given to secure an annuity; but as no mention of the judgment had been made in the memorial, a rule to show cause why the judgment and execution issued thereon should not be set aside was obtained. On showing cause, it was held by the Court that the judgment was one of the securities which the legislature intended to exempt from enrolment; that the contract for the annuity was complete by giving the bond and warrant of attorney; those were the securities on which the party relied; and a registration of all the securities given by the parties was sufficient to satisfy the act, without introducing matter subsequent, though, had the judgment been the only security, it might perhaps have been construed to be within the act.—Rule discharged.

2. *BRADFORD v. BURLAND*, T. T. 1811, K. B. 14 East, 446.

It was urged in this case that the memorial of an annuity was insufficient, as it did not express the trusts of the judgment to be confessed on a bond mentioned in a warrant of attorney which had been given for securing the annuity, or the purposes for which the same was to be confessed; and the Court, it would seem, considered the omission sufficient to invalidate the instrument.

(k) *Policy of insurance, and covenant to insure.*

1. *CHAWNER v. WHALEY*, E. T. 1803, K. B. 3 East, 500.

The defendant granted plaintiff an annuity of 458l. 6s. 3d. for 100 years, if the plaintiff should so long live, by certain bonds, which were all duly registered according to the 17 Geo. 3. c. 26. A bond was, however, left unmemorialized, by which the defendant agreed, in case he should go abroad in the military capacity at any time within the period of three years from the date of the bond, that he would forfeit and pay for any or either of those years he should be absent the sum of 130l. to the plaintiff, as a compensation to him for the loss he might sustain by his, the defendant's going abroad in the said capacity, inasmuch as no office would insure the lives of persons fulfilling abroad their military duties. It was now contended that the annuity was void, on account of the omission in the memorial. *Per Cur.* The annuity is forfeited. The case is, in effect, reduced to this: that the defendant agrees to pay an annuity of 458l. 6s. 8d. if he do not go abroad, and if he does, he agrees to pay the grantee 588l. 6s. 8d. during a certain period. The memorial should therefore have stated the sum to be paid in the event of his going abroad. See 2 Ves. jun. 134; 4 T. R. 694.

2. *WOOD v. PERROT AND OTHERS*, M. T. 1820, C. P. 5 Moore, 63.

A deed creating an annuity contained a covenant that the defendant (the grantor) should not at any time during the continuance of the annuity go upon the seas, or parts beyond them, without seven days notice being first given to the plaintiff (the grantee), in order to enable him to pay such additional premiums of insurance as might be thereby incurred, and which the defendant

should mention the penalty in a warrant of attorney for which judgment is to be entered;

Or the names of the party in whose favour it is given.

Even where judgment is entered up before the memorial is enrolled, the judgment need not be inserted.

Though where the memorial of an annuity did not specify the trusts of a judgment to be confessed on a bond mentioned in a warrant of attorney the omission was held to vitiate the instrument.

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The grant or of an annuity agreed by bond to pay to the grantee an additional 130l. a year if the former should go abroad in a military capacity within a certain period.

The bond was not registered; held that such omission vitiates the annuity.

But under 52 G. 3. it has been held that the memorial of an annuity need not contain a covenant in the deed creating the annuity, "that the grantor would not go abroad without first giving the grantee seven days' notice in order to enable him to pay the additional premiums of insurance as might be incurred," which premiums the grantor had covenanted to pay to the grantee.

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The grant or of an annuity assigned several policies of insurance on his own life to the grantee whereby the latter was the better able to insure the life of the former.

No mention of such an assignment appeared in the memorial.
The Court held that it was the pecuniary consideration only that need be stated in the memorial, and

had covenanted to pay to the plaintiff. This part of the deed was not noticed in the memorial. It was contended that the annuity was void. *Per Cur.* It has been urged that this agreement by the grantor to pay an additional premium in case of his going beyond the sea either constitutes part of the consideration, or must be taken as part of the amount of the annuity to be paid by him to the grantee. But the former cases which have been decided upon the point are wholly unconnected with the present question. They were founded upon the construction which the courts had given to the 17 Geo. 3. c. 26. This question is, however, completely dependant on the 53 G. 3. c. 141. Taking the first and sixth sections of the latter act, and the schedule thereto annexed, together, it appears that the consideration and the amount of the annuity must be confined to the sum actually paid and the annual value of the annuity; and more particularly so, as only the pecuniary consideration for granting the same, and the annual sum to be paid, are required to be set out in the memorial. At the time that the annuity was granted it did not appear that there was any prospect of the grantor's leaving the country. The clause in the deed could not be therefore stated; it depended upon a contingency. It was uncertain where the grantor was going, or whether he went in time of peace or war. The premium to be paid could not possibly be ascertained. Being, therefore, a mere collateral circumstance, and it being impossible to bring it within the terms "pecuniary consideration," the present rule must be discharged.—Rule discharged. See 8 T. R. 184.

3. MORRIS v. JONES, T. T. 1828. K. B. 3 D. & R. 363; S. C. 2 B. & C. 232. The defendant had given a warrant of attorney to the plaintiff to secure the payment of an annuity. It appeared that the defendant at the time of granting it had assigned to the plaintiff certain policies of insurance on the life of the former, which were estimated as worth 1,100*l.* and that no notice had been taken of the assignment of the policies in the memorial of the annuity. It was contended that the assignment of the policies of insurance ought to have been mentioned in the memorial, because they formed an essential part of the consideration. *Per Cur.* In the second section of the statute 53 Geo. 3. c. 141. it is enacted, that a memorial of the pecuniary consideration or considerations for granting the annuity, and the annual sum or sums to be paid, shall be enrolled, or otherwise the deed is declared to be null and void. It is clear, therefore, that it is the pecuniary part of the consideration, and that only, which need to be set out in the memorial. Here the policies were assigned, not as any thing of present value, which could be turned into money, but merely to enable the grantee to insure the life of the grantor at a less premium than he otherwise would have been able to have done. We are therefore of opinion that the substance of the act has been complied with, and that it would be introducing great subtleties into this branch of the law if we were once to begin to calculate the value of policies of insurance, which were merely auxiliary to the annuity.—Rule discharged.*

See 2 B. & A. 206; 1 B. & P. 62; 5 T. R. 473.

* Upon this question coming before the Vice Chancellor, his Honour held that part of the sum which had been paid as consideration money must be considered as having been paid for the assignment of the policies; that the whole of the amount was not paid for the annuity; that therefore the memorial did not state the pecuniary consideration truly; and consequently that the annuity was void. M. S.

It may not be unusual to observe that, according to the ordinary mode in which annuity transactions are conducted, the assignment of the policies to the plaintiff was beneficial not to the plaintiff, but to the defendant. In such dealings the grantee of an annuity for the life of the grantor always takes into account the annual premiums of an insurance to the amount of the purchase money on the grantor's life; and the larger these premiums are the larger must be the annuity granted for a given sum; for the annuity must always be sufficient first to defray the expenses of the insurance, and then to yield to the grantee that rate of annuity interest with a view to which the bargain has been concluded. In the present case, if the plaintiff had had to effect new policies of insurance on the life of the defendant, as the premiums payable on these would have exceeded the premiums payable on the old policies by 100*l.* a-year, the annuity must have been proportionably increased or the purchase money proportionably diminished. The assignment of the old policies, therefore, was clearly beneficial to the defendant.

3d. WITH REFERENCE TO DESCRIBING THE CONSIDERATION.

(a) General rules.

1. HODGES V. MONEY AND BAILEY, H. T. 1792, K. B. 4 T. R. 500. S. P.
- SOVERBY V. HARRIS, M. T. 1791, K. B. 4 T. R. 494. S. P. COUSINS
- V. THOMPSON, T. T. 1765, K. B. 6 T. R. 335.

A rule was obtained to show cause why an annuity, and all the deeds given to secure it should not be set aside on three grounds; 1st, That there was no express substantive averment in the memorial that any consideration had been paid for the grant of the annuity, it only stating "whereby, in consideration of the sum of," &c. 2d, That the act requires that every deed to secure an annuity should be set forth in the memorial, and the consideration of granting the same; whereas here the memorial did not state the consideration of the bond or warrant of attorney, but only of the indenture. 3d, Supposing the first clause of the act would be satisfied by stating the consideration only once in the memorial, and not repeating it with respect to every instrument, &c. yet that at all events the consideration must be set forth in every instrument itself, by the express requisitions of the third clause. *Per Cur.* We are of opinion, as to the first objection, that the averment in the memorial relative to the consideration money is sufficient, although it is merely stated by way of recital; as to the second, it would be absurd to repeat the same thing several times in the memorial; for although there be several deeds to secure the same annuity, yet each expresses the same considerations; and as to the last, it is unfounded as to the two others; for the bond, warrant of attorney, and judgment, must be taken together, and constitute only one assurance; and the act of parliament is satisfied by inserting the consideration in any part of one of the assurances.—Rule discharged.

2. SYMMONS V. MORTIMER, H. T. 1793, K. B. 5 T. R. 139.

On the 8th of July, 1783, the defendant borrowed of the plaintiff 1200*l.* by way of annuity, and for further security he gave his bond and warrant of attorney. The defendant not wishing his name to appear in the public register, it was agreed between them that the bond should be renewed every twenty days, in order to dispense with the necessity of registering a memorial. It was renewed accordingly on the 28th of July. On the 19th of August following a provision of the 17 G. 3. to set it forth by way of recital. And if the consideration be paid at different times it may be described as one payment. These securities, after being renewed several times, were finally, on the 17th of February, enrolled. Upon each renewal the consideration was described as the receipt of 1800*l.* *Per Cur.* We are of opinion that the application is answered by the length of time which has elapsed since the granting this annuity. But supposing that the application had been made sooner, and assuming that the facts disclosed are *bona fide*, it seems no ground for setting aside the annuity. The objection is, that the consideration has not been truly stated in the memorial, because the 1800*l.* is expressed to have been paid as the consideration of the annuity; when, in fact, it was paid in two different sums at different times, for which securities were taken, and the cancelling of the first annuity was the real consideration for giving the unregistered securities. But in truth the money was paid for the grant of a valid annuity; and though the intermediate transactions kept the matter open from time to time, yet the same original contract subsisted. It remained inchoate, and was not complete.

This circumstance, while it inclines the scale of moral justice in favour of the plaintiff, tends in legal effect to confirm the clear, the systematic, and the philosophical principles on which the Vice Chancellor decided the question. For it is the object of the annuity acts to make known, and to afford the means of ascertaining, the comparative moderation or exorbitance of the terms of life annuity contracts. That object will be entirely defeated if, when former old policies of insurance on the life for which the annuity is granted are assigned, the memorial states the pecuniary consideration paid as wholly referable to the annuity, and takes no notice of the assignment. Had that assignment not been made, either the price paid would have been less, or the annuity would have been greater. In short, unless it be known whether such an assignment has or has not been made, no estimate can be formed of the true ratio between the price paid and the annuity granted, or of the comparative fairness or exorbitance of the terms of the contract.

that there was not a ny occasion to mention the assign ment.

[660] Where there are several deeds securing the same annuity it is unnecessary to state the consideration in each of them as they are considered as only constituting one assurance; neither is it requisite that the consideration of the annuity should be averred in the memorial as a substantive fact; it is sufficient to satisfy the provisions of the 17 G. 3. to set it forth by way of recital.

until the giving of the last securities, which were duly registered.—Rule discharged.

3. *WASHBURN v. BIRCH*, M. T. 1793, K. B. 5 T. R. 472.

Where the memorial stated that the consideration was 600*l.* when the real consideration was only 300*l.* in money paid at the time, and the giving up of a former annuity of 50*l.* per annum, the Court ordered the instrument to be delivered up to be cancelled, and the execution on the judgment to be set aside, observing, that the annuity could not be supported, for the whole consideration being stated as so much money paid by the grantee to the grantor was wholly irreconcilable with the real facts connected with the transaction.

4. *MOURS v. LEAKE AND ANOTHER*, M. T. 1799, K. B. 8 T. R. 411.

From affidavits in support of a rule for setting aside an annuity, it appeared that though the sum of 350*l.* was advanced by the plaintiff, a demand was made by the plaintiff's attorney for law charges and prosecution fees, which the defendant then paid out of the 350*l.* And in the affidavit in answer to this application it appears that it was originally agreed that the defendant should pay the expenses of the writings, in consequence of which he had paid 19*l.* 1*9s.* to the plaintiff, after receiving the whole consideration in money. These facts not appearing upon the face of the memorial, it was contended on the part of the defendant, that the annuity was void because the consideration was not truly stated in that instrument. *Per Cur.* We cannot say there has been any improper concealment in this transaction; here no part of the consideration was withheld from the grantor. If any part of the consideration be kept back, under any colour, or if there be any improper concealment, the whole is void. Now, on the contrary, all the consideration was paid to the grantor, who being indebted to the person who drew the writings for the expenses of the same, in pursuance of a previous agreement, immediately paid the amount of the bill, which must be considered as a payment to his attorney under the prior contract. See *Williamson v. Gould*, 1 Bing. 234. and post.

(b) *Describing by whom paid.*

1. *COARE v. GIBLETT*, T. T. 1803, K. B. 4 East, 85.

The following issue was taken in an action to recover the payment of an annuity, viz. that the sum of money mentioned in the condition of the bond to have been paid by W. L. was not paid by the said W. L. A verdict had been found for the plaintiff, after which the defendant obtained a rule to show cause why judgment should not be entered for the defendant, as it appeared that it was in fact paid by the hands of an agent, and not by the hands of W. L.; from which it was contended that the annuity was invalid, inasmuch as the statute 17th Geo. 3. c. 26, requires the name of the person by whom the consideration is advanced to be stated in the memorial. *Per Cur.* Upon an issue framed so generally the objection urged on the part of the defendant cannot be supported. Proof of payment by an agent is in point of law a payment by the principal. The allegation in the plea that W. L. did not pay is therefore in point of law and fact, substantially proved to be untrue. It might have been pleaded by the defendants in their defence that the name of the party by whose hands the money was actually paid was omitted; but such fact should have been specifically stated upon the record, as the general terms of the present issue do not include such a question. It is impossible for us to make this rule absolute.—Rule discharged. See 7 T. R. 248.

2. *ASKREW v. MACKRETH*, In Error. H. T. 1805, House of Lords. 1 N. R. 214. *S. P. EX-PARTE ANSELL*, T. T. 1797, C. P. 1 B. & P. 63, n.

An action of replevin had been brought in the court below, to which the defendant had made cognizance as bailiff of the Duke of Queensbury, and justified the taking of the goods as discharge of the arrears of an annuity which had been granted to the duke. Judgment had been given by the defendant. A writ of error was now brought to reverse the judgment. It appeared upon the record that the sum of 14,000*l.* the consideration paid for the annuity, was paid in notes of the Governor and Company of the Bank of England, by E. L. a clerk of Messrs. Coutts' and Co. the then bankers of the duke, and

But the insertion of 600*l.* as the consideration when 300*l.* was only advanced, and a former annuity of 50*l.* given up invalidates the securities; though it is unnecessary in stating the consideration, to notice bona fide deductions made for the expenses of the annuity deeds, &c.

[662]

The fact of the deed to secure an annuity not stating the name of the agent who actually paid the money, cannot be taken advantage of under an issue stating generally "that the consideration money was not paid by the grantee." But where the consideration of an annuity was paid by a clerk to the bankers of the grantee the omission of the name of the clerk in the deed by which the annuity was granted was

by the duke's direction. It also appeared that the said duke was not then present. The indenture stated the consideration to be "the sum of 14,000*l.* of lawful money of Great Britain, well and truly paid by the said duke," without specifying the name of the person by whose hand the consideration of the annuity was paid. *Per Cur.* The name of the person who actually paid the annuity should have been distinctly and truly set forth in the indenture. *3. COOK v. JONES, REEVES, AND BENWELL. H. T. 1812, K. B. 15 East, 237.*

It was objected in an action for the arrears of an annuity that the deed and memorial had alleged the consideration money to have been paid by the plaintiff, by the hands of W. B. his agent, whereas part of the money belonged to one K. C. and ought therefore to have been stated as paid by W. B. as agent to K. C. to that amount.

Per Cur. W. B. must be viewed as agent to the plaintiff, to whom alone the annuity was granted, although the plaintiff was accountable to K. C. as a trustee for a portion of the annuity. The objection is therefore untenable.

4. DOE, DEM. MASON, AND OTHERS, v. PHILLIPS, M. T. 1846, K. B. 5 M. and S. 369.

An indenture had been made, to which the present defendant was a party, guaranteeing the payment of an annuity stated to be granted "in consideration of —*l.* to the said C. D. by the said A. B. on that day in hand well and truly paid, the receipt whereof was thereby acknowledged." A receipt was endorsed on the indenture for the above sum, as received "from the within named A. B. by the payment of E. F. his agent." This bond was set forth [663] in the memorial, and stated "that A. B. paid to C. D. the said sum of —*l.* by the payment of E. F. his agent." It was argued that the indenture was void, as the agent by whom the consideration was paid was not named in the deed, the consideration being alleged to have been paid by A. B. when it appeared by the receipt to have been paid by A. B.'s agent, and that the receipt endorsed was no part of the deed, so as to remedy the omission in the body of it. The Court, however, held that the payment was virtually made by A. B. although the receipt made it appear that the money actually was paid by an agent's hands, and thought that the consideration was stated with sufficient accuracy so as not to invalidate the instrument in question, by reference to the receipt. See *tit. Condition, 1 Rol. Ab. 413; 9 Ves. 220; 8 T. R. 483.* It appeared from a receipt endorsed on the back of the instrument that the money was paid by the grantee's agent, it was held that the description in the receipt, coupled with the indenture designated the party by whom the money was paid so as to satisfy the annuity act.

(c) *Describing to whom and when paid.*

1. WATTS v. MILLARD AND ANOTHER, E. T. 1794, K. B. 5 T. R. 598.

On a rule to show cause why all the documents to secure this annuity should not be set aside, on the ground that the consideration was alleged in the memorial to be 180*l.* whereas it was only 130*l.* the remaining 50*l.* being retained by Watts, with Millard's consent, for a debt due from one A. and which had been agreed to on the first arrangements being made for the grant of the annuity. *Per Cur.* As the retention of the 50*l.* formed part of the original agreement, that fact should have been stated in the memorial. The rule must therefore be made absolute. See *ex-parte Fallow and wife, 5 T. R. 283; Washburn v. Birch, id. 472.*

2. INCE v. EVERARD, H. T. 1796, K. B. 6 T. R. 545.

A rule was obtained to show cause why the annuity deed should not be set aside; there being two considerations for the deed, viz. 280*l.* paid by plaintiff to defendant, and 10*s.* paid by plaintiff to D. a trustee, when in fact it was only shown in the memorial that the former was paid. But the Court were clearly of opinion that the nominal consideration of 10*s.* need not be set out, as it was in fact never paid, and might be compared to the reservation of a peppercorn-rent.—Rule discharged.*

* *In ex parte Ansell, T. T. 1797, C. P. 1 B. & P. 63, n.* it was urged that it was necessary to state in a memorial the actual mode and manner of payment of an annuity. The counsel cited the opinion of Lord Loughborough, in *Bolton v. Williams, 4 Bro. Ch. Cas.*

holden ir regular. A deed and memorial of an annuity stating the consideration money to have been paid by the grantee by the hands of his agent, are sufficient, although it appeared that part of it was the money of a third person to whom the grantee was to be so far accountable. Where the indenture set forth in the memorial stated the consideration money to have been paid by the grantee to the grantor, and it appeared from a receipt endorsed on the back of the instrument that the money was paid by the grantee's agent, it was held that the description in the receipt, coupled with the indenture sufficiently designated the party by whom the money was paid so as to satisfy the annuity act. The non-inclusion of the fact of part of the consideration having been paid over by the grantee to a third person vitiates the memorial; but a nominal consideration paid to a trustee need not be set forth in the memorial.

[664] A memorial stating

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ey to have
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to A., B., &
C., some or
one of them
is defective.
It is unne-
cessary to
state in the
memorial
the time of
payment of
the consid-
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the value
would be
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the omis-
sion.

And where
it was alle-
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on the 24th
Dec. and it
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that the mo-
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to one of
the grantors
to be depos-
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the defend-
ant's bank-
ers in the
names of
the grant-
ors and
plaintiff's
attorney,
until a bond
to be enter-
ed into by
defendant
was execu-
ted, and
that by the
defendant's
default it
was not in
fact abso-
lutely vest-
ed in the grantors until the 26th, it was held that the annuity was good, the consideration being merely depreciated in the value by the laches of the defendant himself.

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So where
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annuity on a
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3. VAUX V. ANSELL, E. T. 1798, C. P. 1 B. & P. 224.

The consideration money of an annuity was stated in the memorial to have been paid to A., B., and C., some or one of them." A rule nisi was now obtained to set aside the annuity on account of the uncertainty in the description of the parties. It was contended that the memorial was valid, as it appeared by affidavit that the money had been paid on the same day, and that the deed was executed by all the three parties. *Per Cur.* Payment only appears to have been made on the same day, and not at the same time, when the deed was executed by all the parties; and we cannot allow this defect to be remedied by an affidavit of the latter fact.—Rule absolute.

4. COARE V. GIBLETT, T. T. 1803, K. B. 4 East, 85.

To debt on bond, to recover the payment of an annuity, the defendant pleaded, that the consideration money mentioned in the condition of the bond and in the memorial to have been paid on December 24, was not in fact paid on that day. It appeared that the consideration money was paid on that day by the plaintiff, to one of the grantors of the annuity; but the bond of the defendant, a surety not having been executed, it was agreed that the consideration money should be placed in the hands of the plaintiff's bankers, in the names of the grantor, to whom it had been originally paid, and in that of one G. L. the plaintiff's attorney, until all the deeds were executed and ready to be delivered. After the bond was executed by the defendant, the bankers paid over their money to the grantors. A verdict had been found for the defendant on this point, but for the plaintiff on certain other issues. A rule was now obtained, calling on the defendant to show cause why final judgment should not be signed by the plaintiff, notwithstanding the verdict given against him. *Per Cur.* The stat. 17 Geo. 3. c. 26. requires the consideration of an annuity to be stated; but does not in terms render it necessary to state the day of payment. It can only, therefore, become necessary, as forming an ingredient in the value of the consideration, on the supposition that the fact of payment of the purchase money on one day instead of another makes a difference in its value, in respect of being detained beyond the time at which it is stated to have been paid. But it appears that the plaintiff divested himself of the money on the 24th. It was deposited in the hands of the plaintiff's banker, who gave an accountable receipt of it, viz. to pay it over when the bond in question was executed. The money was, in point of law, paid absolutely by the grantees, and the actual payment of it to the grantors was only suspended and postponed until a certain act stipulated to be performed, as a condition precedent on the part of the latter, should be perfected. After the execution of the bond by the defendant, the money became, by relation, a payment by the plaintiff to the grantors, from and at the time of its being originally deposited with the bankers, on that condition. The grantor only lost the benefit of the money for a certain period, owing to his own default; for if the defendant had executed the bond, the grantors of the annuity would have acquired an absolute and immediate control over it on the 24th, instead of having only a partial and fiduciary possession.—Rule absolute. See 3 T. R. 298; 5 id. 139. 283; 6 id. 690; 7 id. 551; 8 id. 328; 5 Co. 846; Com. Dig. tit. Capacity, D. 2.

5. CRAFTURD V. PHILLIPS, H. T. 1806, C. P. 2 N. R. 141.

The consideration money of an annuity was described as having been paid on the 4th of July, by the plaintiff, to one W. L., for whose life, jointly with that of the defendant, the annuity in question had been granted; whereas it appeared, that on that day it had been, in fact, paid by the plaintiff, to one T. H., the common agent of both parties. It was also shown that the defendant afterwards executed the deeds of annuity, in the presence of the said T. H., being such agent; that the said W. L. was then absent at a distance; that the money was paid over to the said W. L. after he executed the deeds; and 809; 2 Ves. jun. 138. S. C. *Per Eyre, C. J.* The deed must express by whom the consideration is paid, but not the memorial.

that it would have been paid over on the 4th July, if the said W. L. had then paid to the executed them. It was from these circumstances objected that the day of payment was incorrectly stated. *Per Cur.* There is no clause of the stat. 17 Geo. 3. c. 26. which requires the day of payment to be stated. At all events, payment to the agent is payment to the principal; and it must be there-ore considered, that the consideration money was paid on July 4. It was the fault of the principal in not executing the deeds, that he did not receive the money sooner.—Judgment for the plaintiff. See 3 T. R. 298; 6 id. 690; 7 id. 390; Ves. jun. 215; 10 id. 209.

6. CRAFTURD v. PHILLIPS, H. T. 1806, C. P. 2 N. R. 141.

An annuity had been granted by the defendant to the plaintiff. Upon an action of debt being brought for arrears, it was objected that the name of the agent, to whom it appeared that the consideration money had been paid, was not stated in the deed. *Per Cur.* In all transactions, payment to the agent is payment to the principal. The requisitions of the second section of the stat. 17 Geo. 3. c. 26. by which it is necessary to state the name of the persons on whose behalf the consideration of an annuity is paid do not tend to support the present objection.—Judgment for the plaintiff.

7. COOKE v. JONES, REEVE, AND BENWELL, H. T. 1812, K. B. 15 East, 237.

A rule nisi was obtained to set aside the judgment signed, and execution issued against the defendant for cancelling the warrant of attorney, given by the defendant Benwell, in an action for arrears of an annuity, on the ground that the deed and memorial stated the consideration money to have been paid to all the defendants; whereas it appeared that Benwell was known to be only a surety for the other two defendants; and for that purpose had executed certain securities, at a meeting held between all the parties. It appeared that previous to the execution of the securities, an agent for the plaintiff paid down the consideration money in Bank notes, which were counted over by all the defendants, each of whom declared the same to be correct, and signed the receipt. It was proved, however, that Jones and Reeve afterwards divided the money received, and Benwell never participated in any portion of it.

Sed per Cur. The statement in the memorial, that the consideration money was paid to all the three defendants is according both to the fact and the legal effect of the transaction.—Rule discharged. See 1 N. R. 214; 2 N. R. 366.

8. HORWOOD EX. OF COARE, v. UNDERHILL, T. T. 1814, K. B. 3 M. & S. 82.

The defendant pleaded to an action of debt, upon a bond, to recover the arrears of an annuity, that in the assurances whereby the said annuity was granted, it was stated, that the plaintiff's testator paid a certain sum, as a consideration of it; and that it was no where alleged that the said sum was advanced by any agent or agents of the plaintiff's testator; and that the same, in the absence of the plaintiff's testator, was advanced on his behalf by one J. L. and D. S. (one of the obligors.) A verdict had been found for the plaintiff. It appeared that the bond had been executed by the three obligors, on the 24th of December; that a receipt for the consideration money had been signed by them; that no part of that money was, however, paid to either of the obligors, before or at that time; that immediately after the execution and signature by the three, the money was paid to D. S., who immediately paid it into a banking-house, in the names of himself and J. L. (who was the attorney for all the parties,) and took the banker's accountable receipt; which was done in consequence of the other parties not attending on that day to execute the bond and sign the receipt. After the execution of the different bonds and securities, viz. on the 26th of December the consideration money was paid over by the bankers. When the question came to be argued before the Court, as to whether the plaintiffs were entitled to recover, the point raised was whether any of the pleas were sustained by the facts proved in evidence, as to invalidate the annuity by reason of the stat. 17 Geo. 3. c. 26.

Per Cur. The payment of the consideration money of the present annuity would have been made to D. S. but upon condition, and upon an understanding that it would be paid in at the banker's, until a future event should

grantee to occur. It cannot therefore be considered as an absolute payment, but must be viewed as the payment of an agent *in medio*, till some further act was done. The statute positively requires, that the assurance should set forth the name of the person by whom the consideration was advanced.

It has, indeed, been decided,* that where the pleas are only in general terms, without reference to the annuity act, an objection like the present is not well raised; but in the present instance they refer clearly, though not specifically, to the provisions of the annuity act. The pleadings of the defendants must, therefore prevail, and judgment of nonsuit be entered. See 9 Ves. 214; 10 id. 209; 13 id. 475; 3 T. R. 298; 6 id. 690; 8 id. 328; 4 East, 85; 2 N. R. 141; 1 H. Bl. 309.

and the bankers paid over the money to D. S. the Court held that a plea alleging that the money was stated in the assurances to have been paid by the grantee, and not showing that the same was in fact advanced by any agent of the grantee's, must be taken as pleaded with reference to the stat. 17 G. 3. c. 26. and that the facts pleaded were an estoppel to the annuitant's recovery.

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(d) *Mode of describing bank notes.*

WRIGHT V. READ, H. T. 1690, K. B. 2 T. R. 554. S. P. RUMBALL V. MURRAY, E. T. 1789, K. B. 3 T. R. 298; COUSINS V. THOMPSON, T. T. 1795, K. B. 6 T. R. 335.

Bank notes may be described as money in the memorial.

A rule had been obtained to show cause why the annuity deeds should not be delivered up to be cancelled, the ground that the true consideration was not set forth in the memorial, part of the consideration being in money, and the rest in Bank notes; whereas the whole consideration was described as money in the memorial; the counsel who showed cause, said, that Bank notes had always been considered as money, and that they were so in the case of tenders. Lord Kenyon said, that Bank notes were considered as money for many purposes; and it was so held by Lord Mansfield and the Court, in Miller v. Race, 1 Burr. 462. And the rest of the Court concurred in opinion that the consideration was well set forth. Rule discharged. See post. tit. Bank Notes, and 3 Atk. 232; 1 Scho. & Lefr. 318-19; 11 Ves. 662; Noyes v; Price, H. T. 16 Geo. 3. Select Cases, 242.

(e) *Mode of describing local notes.*

MORRIS V. WALL, H. T. 1898, C. P. 1 B. & P. 208.

Where a component part of the consideration of an annuity is advanced in local notes the particulars of them should be specified in the memorial.

The consideration money of an annuity was paid "in notes on the Bank of England and country bank notes," without the dates and times of payment of the latter being noticed. The defendant, it was proved, might have been paid in cash, but accepted the local notes in preference. It was now moved to set aside a judgment, which had been obtained on a warrant of attorney, given to secure the annuity. *Per Cur.* Where the consideration of an annuity is paid in notes, not of the Bank of England, they must be set forth, and the days and time of payment distinctly specified, in order that the Court may judge whether they are of such a nature that they may be properly considered as equivalent to cash. Rule absolute. See 3 T. R. 298. 554; 6 id. 690; 8 id. 328.

(f) *Mode of describing banker's checks.*

1. EX PARTE MITCHELL, CLERK, H. T. 1802, K. B. 2 East, 137.

But it is not necessary to set forth in the memorial of an annuity the particulars of a banker's check where the value has been received by the grantor.

The memorial of an annuity stated, that the consideration was paid in money, whereas it appeared that part was paid by a banker's check; the cash for which had been received a month before the execution of the deeds for securing the annuity. It was now moved to cancel those instruments. *Per Cur.* It has been held only necessary to set out in the memorial the payment of the consideration money of an annuity by banker's checks, where the checks have been delivered as payment at the time of granting the annuity; but here the money, payable on the banker's check, was actually received by the grantee before the execution of the deeds, and may be correctly viewed and considered as money paid to her by the grantor. The consideration which has been stated, viz. money, has been therefore properly described in the memorial. See 6 T. R. 690; 8 id. 321.

* 4 East, 95.

2. O'CALLAGAN, EXECUTOR OF STOPFORD, v. SIR JOHN INGILBY, H. T. 1807, K. B. 9 East. 275. Where the consideration of an annuity was stated to be for the price of 1800*l.* which sum was paid by the grantee to the grantors by his draft at or before the sealing, &c. of the indenture, it was held sufficient to show that the consideration money was received by the grantors by means of the draft, and that it was superfluous to state the particulars of the draft in the memorial. [669]

The payment of an annuity granted to the plaintiff's testator was refused, on the ground that the memorial of the deed creating the annuity did not accurately set forth the manner in which the consideration money was paid. The indenture recited in the condition of the bond, stating the payment of the consideration thus, at or for the price or sum of 1800*l.*; which said sum of 1800*l.* was paid by the said Wm. Stopford, (plaintiff's testator) to the said Wm. Morland and Thomas Hammersley (certain trustees appointed to contract for the annuity), by his draft on Messrs. Ransom and Co. his bankers, at or before the sealing and delivery of the said indenture and bond." The annuity deed, as stated in the memorial of that deed, described the consideration thus; "in consideration of the sum of 1800*l.* of lawful money of Great Britain, of the said Wm. Morland and Thomas Hammersley, in hand, paid by the said Wm. Stopford, and which was paid to them by his draft on Messrs. Ransom and Co. his bankers," to be by them the said Wm. Morland and T. Hammersley paid and applied to the purchase of the annuity. *Per Cur.* Where the consideration is not paid in money but by draft, the particulars of that draft must be specially set forth. But if the consideration be paid by a draft converted into cash before the execution of the deeds, it is not necessary to state the particulars of the draft. It is alleged in the deeds cited in the present case, that payment of the money was made, and the means are only subjoined by which the money was paid, viz. by a draft of the plaintiff's testator, on his bankers. It was therefore unnecessary to set forth the particulars of the draft. See 3 T. R. 298; 6 id. 690; 8 id. 328.

(g) *Mode of describing money.*

DRAKE v. ROGERS, E. T. 1820, C. P. 2 B. & B. 19; S. C. 4 Moore, 402.

A rule nisi was obtained to set aside a judgment which had been signed upon a warrant of attorney, given to secure an annuity. It appeared that the consideration consisted of Bank of England notes payable on demand and of a draft, payable at a banker's. It was contended, that the securities on which the annuity had been granted were void, as the memorial had not set forth when the draft was payable, or whether it had been really paid. It appeared also that the witnesses to the indenture creating the annuity were dead, and that the annuity had been regularly paid for the period of 11 years. *Per Cur.* The terms of the memorial are as follows; that "in consideration of 85*l.* in Bank of England notes, payable on demand; and also 65*l.* by a draft, bearing even date therewith, drawn, &c. and payable at, &c. to the defendant paid by the plaintiff, the receipt whereof the defendant duly acknowledges," &c. The receipt of what? not the receipt of the money, but of the draft. Now, upon principle, and in accordance with the current of authorities, we must ask the rule absolute. In point of principle, there is an obvious reason why it should appear on the face of the memorial when the draft is payable. The draft may have been payable at a distant day, in which case the grantors may have been put to the loss of part of the consideration, by getting it discounted. The case of *Berry v. Bently*,* and *Pool v. Cabans*,† are directly in point, and are much stronger than the one before us. In the latter case, the consideration had been paid by a check; and although it was contended that it was unnecessary to specify when a banker's check became payable, it being always considered as money, yet the Court deemed it requisite. Let the rule be therefore made absolute; but, as the annuity has been paid for such a length of time, the condition of the principal being returned by the defendants on taking an account before the prothonotary must be imposed.—Rule absolute.

See 2 East. 85. 88. 137; 9 id. 135. 149, 3 T. R. 298; 1 B. & P. 209.

absolute for setting aside a judgment signed on the condition of returning the principal on an account being taken before the prothonotary.

* 6 T. R. 690.

† 8 T. R. 328.

(h) *Mode of describing a pre-existing debt.*

KIRKMAN V. PRICE, H. T. 1700, C. P. 1 H. Bl 309

Where part of the consideration is a prior debt, it must be described as such.

Rule to show cause why the securities for this annuity should not be delivered up, on the ground that the consideration was not sufficiently set forth in the memorial, which stated generally "the annuity to have been granted in consideration of 160*l.*" paid by the plaintiff to the defendant; but it appeared that 99*l.* of the money had been previously lent by the plaintiff, for which the defendant had given several promissory notes; and that the plaintiff, at the time of granting the annuity, advanced only so much money as remained to complete 160*l.* allowing 12 guineas for the expenses of the deeds, giving up the notes. The counsel, in showing cause, said that the consideration was sufficiently set forth, as the whole money had in fact been received by the defendant, though at different times. But the Court held clearly that the particulars of the consideration were not sufficiently specified, the words of the statute being that the consideration shall be fully and truly set forth and described; and therefore they made the rule absolute.

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The date & particulars of bills or promissory notes must be stated.

(i) *Mode of describing bills of exchange and promissory notes.*

RUMBALL V. MURRAY, E. T. 1789, K. B. 3 T. R. 298.

Rule to show cause why the judgment entered on a bond and warrant of attorney given to secure an annuity should not be set aside, &c. because the consideration was stated in the memorial to be in money, whereas it was in notes; the one a banker's check, the other a promissory note. Against the rule it was contended, that notes, when paid, were by the statute put on the same footing with money, and considered as such; and that as the fourth section of the annuity act seemed to admit that the consideration might be partly in notes, provided they were paid when due, it was unnecessary to make any distinction between notes and money in the memorial; but Lord Kenyon, C. J. observed, that if the dates and other particulars of those notes were not set out, the Court could not see whether a full consideration for the annuity had or had not been given; for if they were payable at a distant time, and no allowance made, the true consideration would not appear on the memorial. Rule absolute. See Chit. on Bills, 107. 331. 333. 6th ed.

(k) *In separate securities.*

SAUNDERS V. HARDINGE, M. T. 1792, K. B. 5 T. R. 9.

Where there are several assurances securing the same annuity, altho' it be not necessary to state the considerations in every one of them, or more than once in the memorial, yet there must be such a reference from the memorial to each assurance which does not contain the consideration as makes it manifest that they are all connected and relate to the same transaction.

The defendant in consideration of 14*l.* granted an annuity of 24*l.* during his life to B. and for securing it gave a bond for 300*l.* and a warrant of attorney assigning his glebe lands for 99 years. In June, 1783, B. assigned the annuity to C., who in April, 1786, assigned to S. the plaintiff. On this last assignment there was a memorial of a deed-poll, dated 7th April, 1786, executed by the defendant, reciting that by indenture dated 26th June, 1783, B. for the considerations therein mentioned, assigned the glebe lands, tithes, &c. within mentioned to C. for the remainder of the within mentioned term; that by an indenture of assignment, bearing even date (with the deed-poll), between C. and the defendant, the same glebe lands; &c. were for the considerations therein mentioned assigned to the plaintiffs for the residue of the term; that the plaintiff had contracted with the defendant for the purchase of a farther annuity of 7*l.* during the defendant's life-time (over and above the within mentioned annuity of 24*l.*) for 42*l.* paid by the plaintiff to the defendant; by which deed-poll, in consideration of 42*l.* paid by the plaintiff to the defendant, the latter assigned to the former certain glebe lands, &c. for the residue of the within mentioned term. Also of a bond dated 8th April, 1786, whereby the defendant became bound to the plaintiff for 400*l.* conditioned for the payment of one clear annuity of 31*l.* by the defendant to the plaintiff during the life of the former. A rule was obtained to show cause why this judgment, and the proceedings thereon, should not be set aside, because the memorial did not state the consideration for the annuity of 31*l.* secured by the bond. The affidavits in an answer to this application contained the two former memorials, the one of the grant of the annuity of 24*l.* from the defendant

to B. and the other of the assignment thereof from B. to C. Against the rule it was argued, that the consideration of the annuity from the defendant to the plaintiff manifestly appeared in the last memorial. That this was an annuity of 31*l*. compounded of two sums 24*l*. and 7*l*. per annum. That the consideration of the latter was stated in terms in the deed-poll to have been 42*l*.; and that the consideration of the former, which was merely an assignment of another annuity, originally granted to B. (and of which there was a regular memorial) might be seen by the deed set forth in the first memorial, to which the last referred. But that if this memorial, taken by itself, was not sufficiently descriptive, yet, when taken with the two former ones to which it referred, and which might be taken into consideration with it as relating to the same transaction in its different stages, the whole consideration appeared. [671]

Per Cur. Under the 17 Geo. 3. c. 26, we are of opinion that this last judgment cannot be supported. Had there been any words of reference in the memorial of the bond, connecting it with the annuity secured by the deed-poll, &c. the bond might have been tenable; but there is nothing in the memorial to connect the one with the other.—Rule absolute.

3d. WITH REFERENCE TO THE DATE.

1. *Downs v. Parkhurst*, H. T. 1789, C. P. cited 2 H. Bl. 13.

In this case the Court of Common Pleas set aside a judgment to secure an annuity, because the date of the warrant of attorney was not stated in the memorial.

2. *EX PARTE CHESTER*, E. T. 1792, K. B. 4 T. R. 694. *S. P. THURKILL v. WALLACE*, cited 4 T. R. 695.

The annuity was secured by a deed of assignment, bond, and warrant of attorney. On a rule to show cause why the deeds should not be set aside, because the memorial did not contain the date of the warrant of attorney, it was contended; 1st, That the Court had no jurisdiction, since the grantee had neither entered up judgment or instituted any other proceedings; and 2dly, That if the Court possessed jurisdiction, yet the warrant of attorney ought only to be set aside, for a defect in one deed cannot vitiate the others, which were truly recited in the memorial. In which opinion the Court acquiesced; and in answer to the first objection said, that the warrant of attorney gave jurisdiction, it being a preceeding in Court.—Rule absolute as to the warrant of attorney.

3. *DOE, ON THE DEMISE OF MASON, AND OTHERS, v. PHILLIPS*, M. T. 1816, K. B. 5 M. & S. 369.

At the trial of this cause, it appeared that the memorial of an annuity set forth the bond securing the annuity, with its proper date. The warrants of attorney which were given also to secure it bore even date with the bond as set forth in the memorial. An indenture, to which the defendant was a party, and upon which the present action was brought, and to which several other persons were parties, was described as "bearing even date with the bond." It was objected that the memorial did not state the date of the indenture; but it being answered that the memorial sufficiently stated the date of the indenture by words of reference to the bond, the objection was not further pressed.

4th. WITH REFERENCE TO DESCRIBING THE WITNESS, &c.

1. *HART v. LOVELACE*, M. T. 1795, K. B. 6 T. R. 471.

A rule was obtained to show cause why a judgment, indenture, and warrant of attorney, given to secure an annuity, should not be set aside on three grounds; 1st, Because in the memorial no date is given to the bond and warrant of attorney. 2dly, That it does not appear with sufficient distinctness, who were the witnesses to the indenture or to the bond and warrant of attorney, the memorial only stating that all the instruments were attested by A. B. &c. or one of them. 3rdly, That it is not stated to whom the consideration money was paid, or that it was paid at all. *Per Cur.* It is not incumbent

that the exact place of residence of the witness should have been set out.

annuity granted by defendant set aside, and the securities delivered up, on the ground that the witnesses, who were attorney's clerks, and were described by their master's place of abode, were not properly described according to the act of parliament. It was contended that the late act of 3 Geo. 4. c. 92.* was a conclusive answer to this application, that act declaring that no further description of the witnesses should be required beyond the names of such witnesses.

[675] *Per Cur.* If this case is not within the proviso of the statute, 3 Geo. 4. c. 92. there is of course an end of the question. But independent of that act, we think that upon the construction of the 52 Geo. 3. c. 141. the memorial of this case is sufficient. By the 17 Geo. 3. c. 26. the names of the witnesses only are required to be inserted. Then comes the 53 Geo. 3. c. 141. in the schedule of which the names of the witnesses are to be inserted thus, E. F. of ———, G. H. of ———. The question therefore is, how did the legislature, at the passing of the act, intend that this blank should be supplied. To determine this we must look to the object of the legislature, and give a reasonable construction to the act. The object of the legislature was to provide that the witnesses should be so designated and described, that they might be found when wanted for the purposes of justice. Now whether it is more conformable with this object, that the witness should be described by the place where he is to be found during the whole day, and where his occupation is, or the lodging to which he resorts at night for the purpose of rest. In the case of *Huslope v. Thorne*, 1 M. & S. 103. it was held by the Court of King's Bench that the party was properly described by his place of occupation, and that case turned on a rule of court which required the true place of abode, and true addition of the party making the affidavit, which is more than this act of parliament (in terms at least) in this case requires. The case of *Darwin v. Lincoln*, and *Smith v. Pritchard*, 5 B. & A.; 5 id. 144. 717; S. C. 1 D. & R. 374. have been pressed upon the Court, but we cannot avoid looking on those cases as of doubtful authority. We therefore think there is no foundation for the objection against this memorial, and that the rule must be discharged with costs.

[676] 9. *CHECK v. JEFFERIES*, T. T. 1823, K. B. 2 B. & C. 1; S. C. 3 D. & R. 185. The memorial of an annuity bond described one of the subscribing witnesses to a warrant of attorney by the initials of his christian name. A rule nisi was now obtained to set aside the different securities, because the name of the witness was not set out at length. *Per Cur.* The initial of the witness' name being only stated is not a compliance with the statute 53 Geo. 3. c. 141. as it is possible that the facilities which that act meant to afford with regard to finding the subscribing witness, might be completely defeated for the want of knowledge of the christian name.—Rule absolute.

5th. WITH REFERENCE TO PLEADING DEFECTS IN THE MEMORIAL

1. *PRÆD, ADMINISTRATOR OF BLACKWELL, v. THE DUCHESS OF CUMBERLAND, EXECUTRIX ON THE DUKE OF CUMBERLAND*, E. T. 1792, K. B. 4 T. R. 585.

To an action of debt on an annuity bond, plea no such memorial as prescribed by the 17 Geo. 3. replication traversing the plea, rejoinder stating that the consideration had been untruly alleged by the memorial to have been paid to both obligors, the Duke and L. when in fact one of them did not receive any portion of the consideration. Special demurrer and joinder, it was contended that the rejoinder was bad on two grounds. 1st. That it was a de-

* This statute, after reciting the 53 Geo. 3. c. 141. respecting the description of the witnesses, and that doubts had been entertained whether it was necessary to insert any more than the name or names of the witnesses there being no words in the said act expressly requiring any more to be inserted, nor any words from which it could be inferred that any more was required to be inserted except the word "of" after the letters "C. F." and "G. H." respectively; and its being expedient to remove all doubts touching the said act, with respect to so much of the memorials required by the said act to be enrolled as relates to any description of the witness or witnesses to any deed, instrument, or assurance, it declares "that no farther or other description of the subscribing witness or witnesses to any deed, bond, instrument, or other assurance whereby any annuity or rent charge is or may be granted, is required in the memorial thereof, besides the names of all such witnesses: and so the said act shall be deemed, construed, and taken."

parture from the plea. 2dly. That it alleged no matter inconsistent with the allegations in the memorial. *Per Cur.* We are clearly of opinion that the rejoinder is a departure from the plea. The defendant having in her plea alleged that there was no memorial, ought not afterwards to be permitted to admit in her rejoinder that there was one, and then deny the validity of it. The other ground of objection is equally valid. Defendant in her rejoinder has averred a fact supposed to be contradictory to the memorial, which is not at all inconsistent therewith; the reason given by her why it is not true, does not support the proposition of its falsity; because though the consideration was not paid actually to the Duke, it might have been paid to some third person under a joint authority from the Duke and L. or to L. for himself and the Duke. The memorial is therefore conformable with the directions of the annuity act, for any thing that appears to the contrary, upon the face of these pleadings.—Judgment for the plaintiff. See 2 Saund. 84. a. n. 1; 1 Chit. Pl. 635; 2 H. Bl. 280; 16 East, 41.

2. *HORN, EXECUTOR, v. HORN AND ANOTHER*, T. T. 1806, K. B. 7 East, 529. To an action of debt brought upon an annuity bond, the consideration of which did not appear upon the face of the bond, or condition set forth upon oyer, it was pleaded that the said writing obligatory was sealed and delivered after the passing of the stat. 17 Geo. 3. c. 26. viz on, &c. and that no memorial of the same was, within twenty days of the execution thereof, enrolled in the Court of Chancery, as required by the act; by reason whereof the said writing obligatory is void. General demurrer for not showing that the consideration was pecuniary. *Per Cur.* Although by the terms of the first clause of the annuity act it is required that a memorial of every annuity bond should be rolled; yet it may be gathered, from the whole purview of the statute, that it only applied to annuities granted upon pecuniary considerations, and not to all annuities. As, therefore, the consideration did not appear upon the face of the bond, or of the condition set forth upon oyer, the plea demurred to is certainly defective. The want of a memorial as objected to in such a form is no bar to the action.—Judgment for the plaintiff. See 5 Rep. 119; Plowd. 376; 4 T. R. 585. 790; 5 id. 639; 2 H. Bl. 280; 1 Chit. Pl. 516. 3d edit.

3. *DE LA RUE v. STEWART*, M. T. 1806, C. P. 2 N. R. 362.

To debt on bond conditioned for the payment of an annuity, the defendant pleaded that he had paid the annuity in manner, and upon the several days and times in and by the condition limited, &c. The plaintiff in his replication traversed these facts, and for breach of the said condition he suggested to the Court that after the making of the bond a large sum of money, to wit, &c. became due, was still in arrear, &c. Demurrer, showing for cause that the plaintiff in his replication had not assigned any breach of the conditions at common law. *Per Cur.* By the statute 8 & 9 W. 3. c. 11. s. 8. no suggestion can be introduced on the record except in the three cases of judgment upon demurrer by confession of *nil dil.* Leave, was, however, granted to plaintiff to amend upon payment of costs. See 1 Saund. 99. 103; 2 Wils. 113; 2 Burr. 775; 2 T. R. 576.

ry 871. 10s. for two quarterly payments became due and was still in arrear: the Court held the replication insufficient, but permitted the plaintiff to amend upon payment of costs.

4. *SIMMONS v. HUNT*, E. T. 1814, C. P. 1 Marsh. 155.

The defendant pleaded to an action upon a bond of annuity that the memorial which had been enrolled "was not a good and sufficient memorial of the said bond according to the form of the statute, by reason whereof the bond on which this action is brought is void in law." Demurrer showing for cause that it was not alleged that no other memorial was enrolled besides the memorial mentioned in the plea; and for not showing in what points and particulars the memorial was defective. The Court called upon the counsel to support his first objection, and afterwards said that the plea may be good, and yet a sufficient memorial may have been filed, as *non constat* but there may have been another subsequently enrolled within the twenty days. It is, therefore, insufficient. And as the defence is undeserving of sanction, we cannot allow an amendment, and must, therefore, give judgment for the plaintiff.

al has been enrolled.

A defect in the memorial of an annuity can not be supplied by affidavit.

An attorney advancing money by way of an annuity is not entitled to any commission, or if part of the consideration money be returned for that purpose, the deeds will be set aside.

The advancement of money at different times for the education and promotion of the defendant is a valid consideration for the grant of an annuity and the Court will not interfere.

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The Court set aside an annuity where the memorial only noticed the bond and warrant of attorney given to secure the annuity by way of recital in the annuity deed even after the death of the grantee, and the lapse of 18 years since the grant;

6th. DEFECTS IN THE MEMORIAL HOW AIDED.

BERRY v. BENTLEY, E. T. 1796, K. B. 6 T. R. 690.

The memorial in this case stated the consideration money of an annuity to have been paid by a promissory note drawn by, &c., and payable at, &c. without stating when the note was payable. The Court was moved to allow the defect to be remedied by an affidavit. *Per Cur.* The memorial must state that the consideration has been paid, and we are of opinion that omission can be supplied by extrinsic evidence.

IV. ANNUITY WHEN VOID OR VACATED.

1. **BROOMHEAD v. EYRE, E. T. 1794, K. B. 5 T. R. 597.**

A. granted an annuity of 10*l.* in trust for C. an attorney. The whole consideration money, 60*l.* was paid to the defendant; but immediately afterwards, and at the same meeting of the parties, the sum of 19*l.* 11*s.* the amount of C.'s bill for preparing the deeds, and for commission, was paid back by A. On a rule to show cause why the annuity deed should not be cancelled, on the grounds that the annuity was void if any part of the consideration be returned to the person advancing the same. *Per Cur.* We are of opinion that C. is not entitled to any commission in putting out his own money, and that the case is within the fourth section of the annuity act, referred to by the counsel for the defendant.—Rule absolute. See 17 Geo. 3. c. 26. s. 9; 53 Geo. 3. c. 141. s. 9.

2. **KELFE v. AMBROSE, E. T. 1798, K. B. 7 Ter. Rep. 551.**

It appeared upon motion to set aside the securities given for securing an annuity, that the consideration for granting it was money that had been lent, advanced, paid, laid out, and expended, to and for the maintenance, education, and advancement of the defendant. The objections taken to the securities were, first, that the considerations stated were not sufficient to support the grant of the annuity within the provisions of the 17 Geo. 3. c. 26. s. 4. Secondly, that if they were sufficient, yet the several sums advanced should have been explicitly set forth, with the times when advanced, and to whom.

Sed Per Cur. The objections cannot prevail; for it is clear that money has been advanced by the plaintiff's wife to the use of the defendant to a larger amount than the sum stated as the consideration of granting this annuity. The different sums had been fairly and bona fide paid by the grantee; therefore this being a money consideration, the objection that it should have been set forth when the different sums of money were paid must fail, as the grantor himself has admitted that the consideration was an antecedent debt due from him to the grantee, arising from different sums paid at different times for his use. It would be extending the act of parliament too far to decide that this annuity could not be supported merely because the respective times when their respective sums of money were advanced by the grantee are not mentioned.—Rule discharged with costs.

3. **VAN BRAAM v. ISAACS, T. T. 1799, C. P. 1 B. & P. 451.**

A recital of a bond and warrant of attorney to secure an annuity was stated in the memorial of the indenture creating the annuity as follows: "that the defendant had executed a bond in the penal sum of 1000*l.* conditioned for the payment of an annuity of 100*l.* to the plaintiff, and also that for the better securing the payment of the said annuity, the defendant had executed a warrant of attorney. No other notice was taken of these instruments than what was introduced, by the recital in the deed. It appeared that the grantee was dead, and that the annuity had stood unimpeached for the period of 18 years. A motion was now made to set aside a judgment which had been obtained for the plaintiff, and to show cause why the warrant of attorney should not be delivered up to be cancelled. *Per Cur.* A memorial of one deed which merely recites the existence of other deeds, cannot be said to be a memorial of other deeds recited. The court are therefore bound to set the annuity aside, notwithstanding the lapse of 18 years.—Rule absolute. See 4 T. R. 494, 500; 5 id. 140; 6 id. 335; 7 id. 540; 8 id. 328.

4. POOLE v. CARANES, M. T. 1799, K. P. 8 T. R. 328.

A rule was obtained to show cause why an annuity, and the documents given to secure the same, should not be set aside, on three grounds. 1st. Because the memorial stated that the money was paid to the defendant, when in fact it was paid to his agent. 2d. That the true consideration was not stated in the memorial, since the agent deducted 10*l.*; and that the insufficient statement of the consideration in the memorial rendered it invalid. On showing cause an affidavit was produced stating that the arrears had been regularly paid for several years, until December last, at which period the agent died. It was then contended that as the defendant had suffered so long a time to elapse since the annuity was granted, and suffered the agent to die before he availed himself of the objections, who could only refute them, it was not competent for him to exercise them now. In this proposition the Court acquiesced, but was going to discharge the rule, when it was urged that the last objection was fatal, as it appeared on the face of the memorial, in stating that part of the consideration money was paid by a check, without stating the particulars. and *Per Cur.* As no material distinction can be drawn between this case and the case of *Berry v. Bentley*, 6 T. R. 690. that decision must govern this, consequently the last objection must prevail.—Rule absolute.

5. SYMONDS v. COBOURNE, E. T. 1796, C. P. 1 B. & P. 482.

Per Cur. In cases where an action is brought upon an annuity bond, and the annuity is void for want of a memorial under the first section of the annuity act, the motion must be to stay proceedings, and not deliver up the annuity bond to be cancelled.

6. SIR HARRY GORING, BART. v. WELLES, CLERK, E. T. 1799, C. P. 1 B. & P. 395.

Certain annuities had been purchased by the plaintiff, which the defendant found himself unable to pay. The plaintiff therefore agreed to give up these annuities upon the defendant's delivering to him a certain sum of money, and a bond payable at a future day. The securities for the annuities were however, to be held by the plaintiff until the time of payment, when he undertook to deliver them up. A rule was obtained to show cause why these securities should not be delivered up to be cancelled, for certain causes which rendered them void. *Per Cur.* Although the annuity bond may be void, the objections were waived, and a new agreement was entered into; end the motion now made is in contravention of that new agreement, to insure the performance of which the annuity securities were to remain in the hands of the grantees. Should the bond prove useless, and the annuity bond be resorted to, an application to the Court may then meet with a different reception. But the present motion being for a purpose quite collateral to the statute 17 Geo. 3. c. 26. we must discharge the rule without costs.

7. CATOR v. HOSTE, M. T. 1802, C. P. 2 B. & P. 557.

The mode in which an agreement containing the power of redeeming an annuity granted by the defendant to the plaintiff had been memorialized, was objected to by the defendant, and a rule nisi had been obtained to set aside the annuity, and restore to the defendant a sum of money which had been levied under an execution in this cause. It appeared that the agreement for the redemption of an annuity was expressed as follows; "Memorandum, I undertake and agree that in a case the said D. H. shall be desirous of repurchasing the annuity granted by him for his life to J. C." &c. and concluded, "witness my hand, R. W. agent for J. C." The memorial stated the clause thus: "And also of a memorandum whereby the said J. C. by R. W. his agent, undertook and agreed that in case the said D. H. should be desirous of repurchasing the annuity, &c. which said memorandum is witnessed by the said R. W." The present rule was obtained on the ground that the agreement was not truly set forth in the memorial; it being there described to be an agreement and undertaking by the plaintiff, whereas it was an agreement and undertaking by R. W.: and although said to be witnessed by him, was in fact signed by him not as a witness, but in the actual capacity of contracting par-

Or after the expiration of many years on an affidavit of the grantee, stating certain facts which passed between him and the agent.

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Where an annuity bond is void for want of a memorial, the Court will not order the former to be delivered up to be cancelled; the motion must be to stay proceedings.

Where an annuity is given to give up their securities on receiving a sum of money and a bond payable at a future day retaining their annuity securities until the bond becomes payable, the Court refused to order them to be delivered up although they might be useless, unless the annuity bond was put in suit; Or to be set aside where the memorial stated that J. C. (the grantee of annuity) agreed for a re-

demption of the annuity by R. W. his agent, and that it was witnessed by R. W. was held sufficient when compared with the agreement, which alleged that R. W. the agent of J. C. entered into such agreement as follows: "I undertake and agree. &c. witness my hand. R. W. agent for J. C."

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ty. *Per Cur.* The objection is answered by saying that it was not necessary that it should be witnessed at all. The objection being therefore no longer tenable, R. W. must be taken to have entered into the agreement as agent only for J. C. and the agreement must be substantially viewed as J. C.'s and not R. W.'s. All that the annuity act requires has been complied with, and the rule must be discharged.—Rule discharged. Sec 1 B. & P. 64; 3 T. R. 298; 5 id. 283; 7 id. 348. 390. 551.

8. CHOOK v. TOWER, M. T. 1808, C. P. 1 Taunt. 372.

Where an accommodation bill given by the drawer as the consideration, of an annuity and which had been accepted by the party to whom it was directed, was dishonoured by means of the drawer's not having provided funds for its payment, but the drawer had subsequently paid it upon notice; held that the fact of immediate payment not having been made by the acceptor did not vacate the annuity under the 3th section of the annuity act.

An accommodation bill of exchange drawn by the plaintiff, and accepted by his agent, was given to the defendant as the consideration of an annuity. It appeared that the bill had been dishonoured by means of plaintiff's not having provided cash for its payment, but that he had paid it upon notice four days after it was due. It was now contended that the bill not having been paid when due, the Court were bound to set aside a judgment which had been signed by the plaintiff, to effectuate which purpose a rule nisi was now obtained. *Per Cur.* The words of the fourth section of the annuity act, rendering it lawful for the Court to order any judgment entered up in respect of an annuity, where notes (the consideration of the annuity), with the privity and consent of the persons advancing the same, shall not be paid when due, to be vacated, only apply to cases where the Court see that there have been fraudulent practices. Privity and consent mean some contrivance that the bill should not be paid. If these words were not in the act it might be different. By using these expressions, the legislature evidently intended to protect grantors from base and dishonest schemes, and from receiving paper worth nothing. When the bill in question became dishonoured, and was taken to the drawer, he paid it. It cannot be therefore said, that within the meaning of the act, the bill was not paid when due. The grantor received the money as soon as he could require the drawer to pay; and as there is no evidence of the privity and consent of the drawer to the non-payment by the acceptor, the rule must be discharged. The fact of the bill being for the accommodation of the drawer matters not, as the acceptor was equally liable to the present defendant as if it had been a *bona fide* transaction. Rule discharged.

COOK v. TOWER, M. T. 1808, C. P. 1 Taunt. 372.

The plaintiff in this action had advanced 500*l.* as the price of an annuity of 65*l.*; but until the annuity deeds could be prepared, had agreed to accept as a security the joint bond of the defendant and one A. B. which was to be cancelled when the annuity deed was executed. A deed was afterwards executed, in which the defendant granted the plaintiff a redeemable annuity of 65*l.* Upon an objection being made to the annuity being redeemable, and a refusal on the part of the defendant to alter it, the plaintiff informed the defendant that he would not deliver up the bond, but would hold him and A. B. liable upon it. A rule nisi was now obtained to set aside a judgment which had been signed by the plaintiff, inasmuch as the bond not having been given up when the deeds were executed, the consideration had been retained within the 4th section of the 17 Geo. 3. c. 26. § 4. *Per Cur.* This question admits of no doubt. The consideration was the debt of 500*l.* The bond was a nullity, and completely extinguished by the annuity deed. If an action had been instituted on the bond, it would have been a good plea to have pleaded that the annuity had been granted in satisfaction of the debt.—Rule discharged.

tion of an annuity and a bond given as security to be cancelled upon the execution of the annuity deeds, and the grantees refused to deliver up the bond upon the completion of the deeds, the Court held that these facts did not invalidate the annuity within the 4th section of the 17 Geo. 4. c. 26.

Where a bond to secure an annuity was improperly described,

10. DENNE v. DUPUIS, E. T. 1809, K. B. 11 East, 134.

It was in this case moved to set aside a judgment on a bond entered up on a warrant of attorney to secure an annuity, and for cancelling the warrant of attorney, on account of a misdescription of the securities in the memorial. *Per Cur.* Let the rule be made absolute as to setting aside the judgment.

The Court were then solicited to order the delivering up of the warrant to be cancelled, which they refused to do; but it being afterwards produced in court, they ordered it to be deposited with the proper officer in court. the Court refused to order a warrant of attorney for entering judgment upon the bond to be cancelled, but directed it as it was in Court, to be delivered into the custody of the proper officer.

11. *Doe, Dem. Delegal, v. Hallowing*, M. T. 1816, K. B. 1 Stark. N. P. 431. An annuity deed is not rendered invalid by a trustee executing after its enrolment. Where the grantee of an annuity was to retain 10l. until the grantor should make her will for her security and make her affidavit not to revoke it, and the magistrate refused to let her swear
In ejectment by the grantee of an annuity, it appeared that one of the trustees under the annuity deed had executed it after the memorial had been enrolled, which it was contended rendered it void. Lord Ellenborough, C. J. at first seemed inclined to nonsuit the plaintiff for this objection, but he permitted him to take a verdict, giving the defendant leave to move. On a motion being made in the ensuing term, the Court refused a rule.

12. *Ex parte Caroline Mackenzie*, E. T. 1812, C. P. 4 Taunt. 323. Where the grantee of an annuity was to retain 10l. until the grantor should make her will for her security and make her affidavit not to revoke it, and the magistrate refused to let her swear
The grantee of the annuity was to retain 10l. until the grantor should make his will to secure the annuity, and an affidavit that he would never revoke it. The magistrate, however, to whom the parties went to swear the affidavit, would not allow the grantor to swear it, in consequence of which the 10l. was paid over to the grantor. After the annuity had been paid for several years, it was moved to set it aside, inasmuch as the 10l. kept back was a retaining part of the consideration on a pretence, so as to invalidate the annuity according to the enactments of the 4th section of the 17 Geo. 3. c. 26. and to enable the Court to order the deed, bond, &c. to be cancelled. *Per Cur.* The 10l. was not money kept back within the meaning of the statute. The whole of the act must be taken together. The legislature meant a retaining for the benefit of the person retaining, and to the injury of a person selling an annuity. But in the present case the money was not kept back for any purpose of the grantees.

the affidavit, in consequence of which the 10l. was returned; it was held that the 10l. was not money retained so as to render the annuity, &c. void by the 4th section of the stat. 17 Geo. 3. c. 26.

13. *Readshaw v. Balders*, T. T. 1811, C. P. 4 Taunt. 57. S. P. *Howe v. Syngé*, E. T. 1812, K. B. 15 East, 440. [683]

A rule nisi was obtained to arrest the judgment upon a verdict given for the plaintiff under the following circumstances:—It appeared that the defendant had granted an annuity to the plaintiff, and had agreed to pay it "without any deduction or abatement whatsoever out of the same or any part thereof, for or in respect to the then present or any then future tax upon property." A verdict having been found for the plaintiff for a certain amount of arrears after deducting the property tax, the present motion was made on the ground that the stat. 46 Geo. 3, c. 65, § 115, rendered the whole annuity void, as it provides "that all contracts, covenants, and agreements, made or entered into for payment of any interest, rent, or other annual payment aforesaid in full, without allowing a deduction in respect to the property tax, shall be void." Where the grantor of an annuity covenanted to pay it without any deduction, after in respect of the then present or of the then future property tax, the Court held that the stat. 46 G. 3. c. 65, § 115, (which is retrospective) only avoided the annuity as far as related to the deduction of the property tax, but not with reference to the payment of the annuity of such deduction.

Per Cur. The use of the word "void," in this statute, which certainly has a retrospective operation, and therefore applies in this case, only means that notwithstanding the present contract (by which the annuitant would without the aid of the statute be enabled to withhold his consent to the allowance prescribed by the act) all deductions and repayments shall be allowed accordingly. It would be, however, doing great injustice to extend it further than either the words or the evident intention of the act requires, and it cannot be supposed that the legislature meant without any apparent necessity to avoid the whole deed.—Rule discharged. See T. R. 603; 5 id. 641; 11 East, 165; 13 id. 87.

14. *Hurd v. Girdleston*, H. T. 1815, C. P. 6 Taunt. 8; S. C. 1 Marsh, 407. of the property tax, but not with reference to the payment of the annuity of such deduction.
The defence to an action of covenant for the arrears of an annuity was, that the plaintiff, an attorney, purchased the annuity, and, after he had paid the consideration money, received from the defendant the amount of a bill for business done, including a charge for searches for incumbrances, which searches had never been made. It was left to the jury to say whether this charge had been made with an intent to get back part of the consideration money.

(within the meaning of the 4th section of the annuity act,) or whether the overcharge had been made through mere inadvertance or mistake. Verdict for plaintiff. A motion was now made for a new trial. *Per Cur.* If the present charge had been made for the purpose of fraudulently paying less than was to appear on the memorial, the transaction would have been illegal. The jury have however found that there was no fraudulent intention on the part of the plaintiff. The object of the act was to protect the grantees of annuities from imposition by the statement of a larger sum in the memorial than was the *bona fide* consideration; but it never meant to deprive a person of his property for a mere mistake.—Rule discharged. See 5 T. R. 597.

Where an attorney who was the grantee of an annuity, after having paid the consideration money, received from the grantor the payment of a bill which included an *item* for business never done; it was held that the inadvertant payment of this charge did not invalidate the annuity.

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15. ANON. H. T. 1815, K. B. 2 Chit. Rep. 34.

Judgment had been entered upon a warrant of attorney given to secure an annuity, but no memorial of the security had been enrolled. A rule nisi had been obtained to set it aside. It was contended that the rule must be discharged, as the defendant himself had been the cause of the memorial not having been enrolled. The Court, however, made the rule absolute; they were then applied to, to take the warrant of attorney off the file, which application was refused.—Rule absolute. See Barnes, 8.

Where a memorial of a warrant of attorney given to secure an annuity had not been enrolled at the request of the grantor, the Court held that he was not thereby estopped from impeaching the judgment, but they refused to take the warrant off the file.

16. JACKSON V. LORD MILSINGTON, E. T. 1815, C. P. 6 Taunt. 189.

The grantor having paid an instalment of an annuity sooner than authorised by the terms of the deed and memorial does not vacate the security. It was moved to set aside an annuity on the ground that upon an application by the grantee, the grantor had paid a half yearly instalment commencing half a year sooner than was warranted by the deed and the memorial. *Per Cur.* A payment made by the grantor in his own wrong not made in pursuance of any previous agreement repugnant to the deed, is no breach of the annuity act to induce us to grant the present application.

17. MOOTHAM V. HOW, T. T. 1817, C. P. 7 Taunt. 596.

The attorney for the grantor of an annuity, when the consideration money was paid down, said that he must retain 50*l.* for expenses, which sum he deducted, and paid the grantor the residue. It was now moved to set aside the annuity, on account of the exhorbitance of the charge. *Per Cur.* It has been agreed that the grantor was to pay the expenses; he chooses an attorney who has perhaps acted erroneously. The grantee is not, however, to suffer on that account.—Rule refused.

The grantee cannot be prejudiced by the fact of the grantor's attorney retaining an unreasonable sum for expenses out of the consideration money at the time of payment.

18. WILLIAMS V. HOCKIN, T. T. 1818, C. P. 8 Taunt. 435.

The court set aside an annuity after the lapse of 6 years, during two of which it was regularly paid, upon the application of the party himself showing that the consideration money and deposited in the hands of the plaintiff's attorney, to be called for from time to time, according as improvements to a certain amount had been made. The money had been advanced in such manner from time to time, and had all been paid over three months after the grant of the annuity, and it was sworn by the plaintiff's attorney that no profit had accrued either directly or indirectly to the plaintiff or himself. It was, however, contended that the money which had been thus temporarily placed in the hands of the plaintiff's attorney had

19. BARBER V. GAMSON, H. T. 1821, K. B. 4 B. & A. 281.

An annuity had been granted by the plaintiff to the defendant, which was to be charged on certain leasehold premises. As the property was susceptible of much improvement, it was agreed that part of the consideration should be deposited in the hands of the plaintiff's attorney, to be called for from time to time, according as improvements to a certain amount had been made. The money had been advanced in such manner from time to time, and had all been paid over three months after the grant of the annuity, and it was sworn by the plaintiff's attorney that no profit had accrued either directly or indirectly to the plaintiff or himself. It was, however, contended that the money which had been thus temporarily placed in the hands of the plaintiff's attorney had

been retained contrary to the provisions of the stat. 53 Geo. 3. c. 141. § 6. [685]
 A rule was now obtained to show cause why the annuity should not be ad- Where part
 judged null and void. *Per Cur.* The 6th clause of the statute 53 Geo. 3, c. of the con-
 121. § 6. gives to the Court a discretionary power to impose such terms as sideration
 the justice of the case may require. It is not compulsory upon them to set of an annui-
 aside the annuity. The statute meant to guard against fraudulent and unfair ty secured
 dealings and practices; this, therefore, being a penal clause, and the power upon how-
 of the Court to interfere being purely discretionary, it ought clearly to appear ces was pla-
 that the practices on the part of the grantee or his agent have been such as ced in the
 to evidence some misconduct which has been prejudicial to the grantor of this hands of the
 annuity. But the agreement originated with the grantor himself, and was grantee's
 highly beneficial to him by the improvement of the premises. No advantage attorney to
 has been reaped by the grantee, except collaterally by the increased value be paid
 of the premises, upon the security of which the annuity was purchased. We over to the
 must therefore discharge the rule; but upon the terms that no annuity interest grantor
 be charged on the sum retained except from the period when it was finally from time
 paid.—Rule discharged. See 1 Taunt. 372; 4 id. 323; 6 T. R. 690; 8 id. to time
 308; 4 East, 85; 3 B. & P. 19. when the
 premises
 should be
 improved

to the amount, and it was all paid over within three months, the court refused to vacate the annuity,
 as the transaction did not appear a fraudulent retainer, but discharged the rule upon the terms that no
 annuity interest should be charged on the sum retained except from the period when it was finally
 paid.

20. *WILLIAMSON v. HENRY MICHAEL GOOLD*, E. T. 1823, C. P. 1 Bing. 234.

A rule nisi was obtained calling on the plaintiff to show cause why the an- Where a
 nuity granted by the defendant to him, together with the judgment and other material
 documents by which it was secured, should not be set aside. The facts, as dis- portion of
 closed in the defendant's affidavit, were, that he had contracted with one How- the consid-
 ard for a further sum of 3,130*l.* to be advanced him in addition to other sums eration mo-
 already due and for which the defendant had granted an annuity for his life, ney was re-
 out of which Howard was to pay off the sums due, and for procuring the sum tained by
 of 3,130*l.* Howard was to receive 10 per cent. That Gibbs, acting in the the agent of
 capacity of agent to the plaintiff, did afterwards retain from and out of the said the grantee
 4,130*l.* the various sums originally due, and also a further sum of 450*l.*, 413*l.* of an annui-
 whereof Gibbs declared was due to Howard for the procuration money, and ty for the
 for his costs in preparing the securities, at the rate of 10 per cent. on such expense of
 3,130*l.* and the residue whereof was chargeable for the travelling expenses deeds, joia-
 and trouble of the said Gibbs, and two other persons who accompanied tures, &c.
 him to witness the execution of the securities. After these deductions, Gibbs the Court
 as agent for the plaintiff, paid down to the defendant 990*l.* being the balance notwithstan-
 then remaining, 990*l.* was the only part of the sum of 4,130*l.* which ever came ding the
 to the defendant's hands; and that neither Howard or Gibbs ever were agents lapse of 10
 for the defendant. years, set a-
 side the an-
 nuity on the
 terms of an
 account be-
 ing taken,
 and the de-
 fendant on
 undertaking
 to pay
 what might
 be due for
 principal
 and legal
 interest.

In answer to this affidavit of the defendant, there was an affidavit by the
 plaintiff, Gibbs, and others, that no part of the purchase money of the annuity
 was by the direction or privity of the plaintiff, retained or kept back. That
 after the securities were executed, the whole of the consideration money was
 paid over to the defendant in their presence; Sir George Goold, the brother of
 the defendant, being also present. That Gibbs was not in any manner author- be due for
 ized by any person interested in the annuity granted, to keep back or retain principal
 any part of such consideration money, and that there was no agreement that and legal
 Howard should receive 10 per cent. for procuration money or commission. It interest.
 appeared that the defendant had twice taken the benefit of the insolvent [686]
 debtor's act; on both occasions he had in his schedule of debts set forth this
 annuity as subsisting and payable from him, without any objection to its valid-
 ity. *Per Cur.* If part of the consideration money has been retained by the
 grantee of the annuity, or by his agent there is an end of the question. It has
 been argued that if it has been retained by one or the other, either by the party
 himself retaining the money, or by the agent of the party employed under the
 circumstances in which he employed Gibbs on this particular occasion, it is the
 same thing. It becomes, therefore, necessary to look into the conduct of

Gibbs, and of Williamson, who is the grantee of the annuity. Now we find Gibbs going a distance with two witnesses to attest the payment to the grantor of the annuity; and the moment the money is put into the hands of the grantor, these witnesses are made to quit the room, and then a large sum of money is held back, part of it for the charge of preparing the deeds, and the other part as a consideration for negotiating the annuity. Now looking at the case under that general point of view, if it respected the conduct of Gibbs only, can we say this is such a consideration for the payment of the annuity as the Court can give sanction to? Clearly not. But then it is said, is Williamson responsible for the conduct of Gibbs? No doubt a man may employ an agent to purchase an annuity; and we see no reason on general grounds, to distinguish in a case of this description, between the conduct of the principal and the conduct of the agent, any more than in any other case. Now on this part of the case, without looking into the contradictions in the affidavits, Williamson appears from his own deposition to be the grantee of the annuity, and he stands in a particular relation with respect to Mr. Gibbs. Gibbs was the common agent of both parties; if Williamson meant fairly, he should make out his case in more clear and definite terms. Now, how does he do that? He says he paid or caused to be paid to Gibbs, for the purpose of paying it over to the grantee of the annuity. Now he does not tell us that on such a day, and at such a place, and in such a manner, he paid over such a sum of money to Gibbs, to be by him paid to the grantor of the annuity. The words of the act are, that no part of the consideration shall be returned or retained; he swears that no part to his knowledge has been retained, putting it in the strict meaning of the word "retained;" but he does not swear that no part to his knowledge was retained in the ordinary sense of the word. On the affidavit, therefore, of Williamson, without going any further, we are satisfied that he has not explained this part of the transaction in the way the act of parliament requires; but has, on the contrary, sworn to the facts connected with the transaction in the most guarded and suspicious manner. We must therefore vacate the judgment, and the party must pay back the principal and interest, notwithstanding ten years have elapsed since the annuity was granted. See 2 East, 85; 2 B. & P. 19; 8 T. R. 411.

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21. GORTON V. CHAMPNEYS.* COVENTRY V. SAME, T. T. 1823, C. P. MS.; S. C. 1 Bing. 287.

An annuity will be set aside on the same terms where it appears that the agent of the grantee has kept back part of the consideration money for a debt alleged to be due from the grantee to himself.

A rule nisi was obtained in each of these cases by the defendant, requiring the plaintiff to show cause why the proceedings upon the judgment entered up by them against him for securing the payment of the annuity granted by

* In *Carlton v. Porter*, M. T. 5 Geo. 4 C. P. MS. Mr. Sergeant Vaughan obtained, in last Trinity term, a rule to show cause why an annuity granted by the defendant to the plaintiff should not be set aside, and the deeds delivered up to be cancelled on the ground that part of the consideration money had been retained or returned when the annuity was granted. The rule was obtained upon an affidavit of the defendant stating that the consideration money, which was £807, was paid to him for an annuity of 105*l.*; that when the transaction was about to be completed, Messrs. Howard and Gibbs, who had negotiated it, claimed of him two sums, one of 90*l.* on an account due to them, and another of 50*l.* as for procuration money, and that he consented that they should retain these sums, as he was greatly distressed for money, and was afraid that if he made any objections to their proposal they would contrive to put an end to the negotiation. Under these circumstances he applied to the Court for relief under the provisions of the act of 53 Geo. c. 141. § 6.

Mr. Justice Park observed, that in his opinion the case of *Gorton v. Champneys* was decisive as to the fate of this application.

It was then urged that none of the cases which had yet been decided on points of this nature determined that the agent who conducted the negotiation was the agent both of the grantor and grantee, and equally bound them both. In the case of *St. John v. Champneys*, 1 Bing. 77, the Court had sustained the annuity.

Mr. Justice Park.—We sustained the annuity in that case because the plaintiff did not send his money through Howard and Gibbs, but through his banker on whom he drew checks. We are therefore of opinion that after what occurred after the payment of those checks to the defendants could not be considered as at all binding the plaintiff.

It was then argued, that in the present case it was clear from the defendant's own affidavit that the money had not been retained from him by Messrs. Howard and Gibbs, but had been paid to them after he had received it.

The Lord Chief Justice observed that as far as he could perceive, the money had been returned to Messrs. Howard and Gibbs, in consequence of a previous agreement that they

him, should not be stayed, and why the deeds securing the annuity should not be given up to be cancelled, upon the alleged ground that part of the consideration money for the annuity having been retained. *Per Cur.* The similitude between these two cases is sufficient to justify the Court in pronouncing but one judgment. It appears that a sum of money being wanted by the defendant, an application was made to Howard and Gibbs to procure that pecuniary assistance, and an agreement was entered into for their receiving 9l. per cent. as procuration money; and that only 800l. out of 6200l. was received by the defendant, the remainder of the consideration moneys being on various pretences kept back, in respect of prior transactions between the same parties. No part of these facts are denied by the affidavits of those who are competent to negative their existence. It has been sworn by Gibbs and the witnesses that the money was *bona fide* paid over to the defendant; but they do not distinctly and unequivocally state that they saw the money delivered to the defendant, and that he took it away. They cannot substantiate such a fact, because the accounts and reckonings gone into and investigated immediately after their departure between Gibbs and the defendant, materially decreased the sum of money to be actually paid over. This therefore puts an end to all the suggested hypothesis as to the defendant going off with the money, and settling with Howard and Gibbs at another time. But it has been urged that the plaintiffs have denied all cognizance of a retention of any part of the consideration money, and if any money was retained by Howard and Gibbs, they were agents of the defendant. But let us now see what is the evidence to establish the agency, and we shall find it appear that Howard and Gibbs were also accredited agents of the plaintiffs. First, Burton was the agent of the defendant; he applied to Howard and Gibbs, and negotiated the whole business; but it is said that Howard and Gibbs were also the defendant's agents. This is negatived by all the circumstances proved. Coventry's affidavit, on the contrary, states that he had no connexion with Howard and Gibbs, except in the matters thereinbefore mentioned. Now the matters before mentioned, being with respect to the purchase of an annuity, what can this language mean, but that they had before been concerned in negotiating annuities for him. He even says that the balance of moneys belonging to him then remaining in their hands, was about 1,200l.; from this statement it is manifest that there was a running account between them. These facts most strongly establish the agency of Howard and Gibbs for Mr. Coventry. As against Gorton, the evidence of Howard and Gibbs' agency is still more cogent and convincing. Two books regularly marked as exhibits are referred to in the affidavits; and on examining them we find that there is a regular pass between Howard and Gibbs and Gorton, respecting annuities, all negotiated by Howard and Gibbs for Gorton; but here Howard and Gibbs, even if agents for the defendant, were not strangers to the plaintiffs, as it has been contended. In the contract before us they were the only avowed and ostensible persons, and the defendant contracted to secure annuities to persons to be nominated by them. As to the law, although the word agent is not to be found in either of the acts of parliament, all the facts, not only as they regard the principal, but as they regard the agent, also ought to be before the Court. The decision of *Mootham v. How*, 7 Taunt. 596. is likewise cogently applicable. That was a case in which it was determined that where the attorney of the grantor of the annuity at the time of the payment of the purchase money retains an unreasonable part of it for the expense of the deed, the Court will not set aside the annuity. In this case the rule was refused because the detention had been made by the attorney for the grantor, not of the grantee. It was there correctly observed, "That the question depends wholly on the retainer; if the person had been the attorney of the grantee, he must be accounted; but when he is the attorney of the grantor it is had made with the defendant. Now it made no difference whether the money was retained by, or returned to them. The plaintiff, by giving them her money, had vested them with authority which enabled them to extort their own terms from the defendant, and must therefore be responsible for the consequences of their acts. He was of opinion that this annuity must be set aside upon payment of the principal and interest.

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But where the grantee had been dead 6 years, during which time the annuity had been regularly paid to his executor, the Court would not interfere, and intimated that no objection *dehors* the memorial of an annuity could be in general entertained by the Court after the lapse of 6 years by analogy to the statute of limitations.

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The Court refused to set aside a warrant of attorney given as a security for the payment of an annuity secured upon freeholds supposed to be of greater annual value, for want of a memorial upon affidavits of the premises. A rule nisi to set aside a judgment and warrant of attorney given to secure an annuity, for a defect in the memorial was made absolute; but as it was the case of an

different." The case of *Williamson v. Gould*, 1 Big. 234. is of a similar kind, and we think if we did not put the construction we now do upon the act of parliament, our decision would militate against the clauses contained in that enactment. It is clear that the statute was intended to prevent fraud. In construing statutes of that description, it is an inflexible principle, that they are to be liberally interpreted. Upon these grounds we are of opinion, that these annuities cannot be supported; and as a discretion has been given to us by the legislature, these rules must be made absolute on the terms of the defendant's refunding such a sum for principle and interest as the prothonotary shall find the grantees are entitled to receive, upon taking an account between the parties.—Rule absolute accordingly. See 2 Ves. jun. 138; 7 T. R. 249; 1 Taunt. 372; 7 id. 596; 4 B. & A. 281; 1 B. & C. 61; S. C. 2 D. & R. 150.

22. *EX PARTE MAXWELL*, M. T. 1801, K. B. 2 East. 85. S. P. *MOOTHAM v. How*, T. T. 1817, C. P. 7 Taunt. 596.

An annuity was granted in the year 1790. The grantee died in 1794. It appeared that it had been regularly paid to the grantee and his executor since his death until the year 1800, without any objection having been made to the payment. A rule was now made to show cause why the annuity securities should not be set aside for a supposed defect in the consideration. It was contended that the grantor was precluded from disputing the sufficiency of the consideration, as so many years had elapsed, and as no objection had been made till after the death of the grantee, who alone could give any account of the transaction to those concerned in his behalf. *Per Cur.* After so long a period has elapsed, and after an annuity has been regularly paid for near seven years since the death of the grantee, we cannot now interfere. We may also bear in mind that more than the period fixed by the statute of limitations* for the regulation of personal property has transpired; and that that statute may in this, as well as in any other instance, be rendered effectual, we must discharge the rule.—Rule discharged. See 8 T. R. 328.

23. *SAUNDERS v. WRIGHT*, T. T. 1808, C. P. 1 Taunt. 369.

An annuity had been granted secured upon a freehold property supposed to be of equal or greater annual value. A rule nisi had been obtained on the part of the defendant to set aside a warrant of attorney, which had been given as a collateral security for want of a memorial. It appeared upon affidavits, that the defendant voluntarily applied for the purchase of the annuity, and had represented the freehold to be of greater value; but it also appeared, upon counter affidavits, that several surveyors had since estimated the premises at a much less sum than the defendant had represented them to be worth. The Court refused to decide the question upon affidavits, but directed an issue, in which the grantee was to be plaintiff, to try whether the premises at the time of granting the annuity were of equal or greater value than they had been represented by the grantor. A verdict was found for the plaintiff, and the rule was afterwards discharged.—Rule discharged.

24. *DICKENSON, EXECUTOR, &c. v. BOYNE*, M. T. 1798, C. P. 1 B. & P. 335.

The memorial of an annuity was in this case objected to on the ground that a clause of redemption contained in the deed was not inserted in it. *Per Cur.* The rule which had been obtained to set aside the annuity security must be made absolute, but without costs; as this being the case of an executor, he could not be supposed to be cognizant of the nature of the deeds.—Rule absolute without costs.

* In *ex parte Maxwell*, Lord Kenyon says, "during the life of the grantee no objection was taken to the annuity, and the interest was regularly paid, and this has continued to be done for near seven years since his death." But in *Drake v. Rogers*, 2 B. & P. 19. eleven or twelve years had elapsed, and though there was an objection on the face of the memorial, the Court decided chiefly on the circumstances of the case, and set aside the annuity, though all the witnesses were dead. There is therefore no such rule as the plaintiff's counsel here contended for, but each case depends on its own peculiar circumstances. *Per Park*, J. 1 Bing. 240.

V. WHEN PAROL EVIDENCE ADMITTED TO EXPLAIN OR VARY.

HAYNES v. HARE, T. T. 1791, C. P. 1 H. Bl. 659.

A bill had been filed in Chancery to redeem an annuity secured by a bond and judgment, stating that there had been an agreement between the parties that it should be redeemable within a certain period, but that agreement did not appear on the face of the bond. Buller, J. who presided for the Lord Chancellor, dismissed the bill, because parol evidence could not be received in contradiction to the annuity securities, but the parties were recommended to apply to the court in which the judgment had been rendered up. A rule was accordingly granted in this court, to show cause why, upon payment of, &c. the annuity should not be vacated, the bond and warrant of attorney delivered up to be cancelled, and satisfaction entered on the record. After the case had been finally argued, it was said *Per Cur.* The security being a judgment entered on a warrant of attorney; it is in its inception under the sanction of the Court, and under its controul; and we may examine into the consideration on which it was entered up, and not permit a party to receive more than the justice of the case entitles him to. But under the present circumstances it is impossible for the Court consistently with justice, to permit the redemption as prayed for; that would entirely open the transaction. Here the person on whose part the judgment was entered up is dead, and the only evidence is the declaration of Harborne the attorney; consequently the question is, whether the Court can permit terms not inserted in the deed which the parties have executed to be added to the contract, of which the judgment is the full and explicit evidence. This brings us to the question which has been argued—whether, on the testimony of a witness to a parol communication between the parties, a term can be added to the contract which does not appear in the instrument, by which that contract was established. It is not necessary to cite any case to prove the proposition that parol evidence of a parol communication between the parties ought not to be received, to add a term not inserted in the specific agreement which they have executed, and for this plain reason, that what had passed between them in that communication may have been altered and shifted, in a variety of ways; but what they have signed and sealed was finally settled. It would destroy all trust; it would destroy all security, and lay it open, unless the parties are completely bound by what they have signed and sealed.—Rule discharged without costs.

executor, without costs.

Altho' the Court in which judgment is entered up for an annuity has an equitable jurisdiction over such judgment, and on application will examine into the consideration on which it was found, yet the testimony of a witness [691] relative to a parol communication between the parties cannot be admitted.

Where an annuity was rescinded after it has been paid for some time, the purchaser is entitled to

VI. OF RECOVERING BACK THE CONSIDERATION PAID BY GRANTEE.

1. BEAUCHAMP v. BORRET, 11. T. 1792, K. B. N. P. Peake, 109.

An annuity being invalid for want of enrolment, this action was brought on an agreement entered into, two years subsequent to the granting the annuity between the grantor and grantee, that the annuity should cease, and that the latter should receive the purchase money and the interest from the last yearly payment. The question was, whether under this agreement the annuity paid for the two years should be deducted from the purchase money.

receive back his whole purchase money.

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Per Lord Kenyon, C. J. As justice and the agreement concur in this case, the latter must be enforced; consequently the full purchase money, with interest from the time when the annuity terminated, without deducting the previous payments, must be paid to the plaintiff. See contra, Hicks v. Hicks, 3 East, 16; 5 Ves. juu. 608. But see Burdon v. Browning, 1 Taunt. 520.

Where the memorial of an annuity is void through the negligence of the grantee, he cannot recover the purchase money in an action for money had & received.

2. WEEDLE v. LYNAM AND ANOTHER, E. T. 1795, K. B. 1 Esp. N. P. 309.

This was an action for money had and received to recover back the consideration money paid for an annuity, on the ground that there was a defect in the memorial, which rendered the annuity void. *Per Lord Kenyon, C. J.* I cannot permit the plaintiff to take advantage of his own wrong; here the annuity became void through his own act; nor does it appear that he endeavoured to re-execute the securities, or has he ever applied for payment of the annuity; received nor has the annuity been set aside by any act of the Court. I am therefore of opinion that the plaintiff cannot recover.—Plaintiff nonsuited.

But grantor may set off the yearly payments, which he has made to the grantee. Where money is advanced up on an agreement for an annuity, to be charged upon a specific estate, and no steps are taken by the borrower to effect the grant, the amount may be recovered in execution for money had & received.

[693]
Or if the grantor of an annuity commit an act which renders it void, the grantee may recover back the consideration money. In an action for money had and received to recover back the consideration of an annuity which had been set aside, the defendant may set off payments made in respect thereof, although barred by the statute of limitation, unless the plaintiff reply the statute.

See semb.
that where

3. *HILL v. HILLS*, M. T. 1802, K. B. N. P. 4 Esp. 196; *semb.* S. C. 3 East, 16. post, 693.

The defendant to an action of assumpsit to recover back the consideration money of an annuity, pleaded; 1st. The general issue; 2d. A set off. It appeared that the memorial of the annuity was void for want of being properly registered; and the defendant having pleaded that to an action of debt on the bond, the plaintiff entered a *vol. pros.* and then commenced this action.

The defendant admitted the claim, but relied on the set off, which was the payments made under the annuity, and which exceeded the sum advanced.

For the plaintiff it was urged, 1st. That money once paid might be recovered back again on failure of the consideration. 2d. That the defendant could only set off the sums paid six years before the action. Per Lord Ellenborough, C. J. I am of opinion that the several sums paid may be set off; and that the plaintiff, to deprive the defendant of the benefit of it, should have replied the statute of limitation to all but six years, which he has not done, but replied generally; he must therefore be nonsuited.

4. *RICHARDS v. BORRET*, H. T. 1800, K. B. N. P. 3 Esp. 102.

A prisoner applied to B. an attorney to procure money for him by way of annuity, which he accordingly obtained from the plaintiff; subsequently he made a second application; and upon the plaintiff objecting to the common security, he deposited with him a lease of certain estates. At the trial of an action for money had and received, to recover back the purchase money, the plaintiff endeavoured to establish that the defendant had intended, by the deposit, to charge his real property with the payment of the last annuity, and that having failed in doing so, the plaintiff was entitled to recover the amount advanced. It was argued for the defendant, that the Court had not been applied to to set aside the annuity, the securities were only voidable, and that the plaintiff could not recover. Per Lord Kenyon, C. J. I think it is unequivocally clear that the plaintiff is entitled to recover, since the defendant has not performed that which he undertook to do; viz. to charge his real estates.

5. *ESTE v. BROOMHEAD*, H. T. 1801, K. B. N. P. 3 Esp. 261.

On an objection being taken to an action of assumpsit, to recover back the purchase money, that the annuity had not been set aside, it was answered that an act equivalent to setting it aside had been committed, since, to an action of debt by the grantee for the arrears, the grantor had pleaded that the bond was void through a defect in the memorial; and that the grantee had consequently entered a *vol. pros.* as to that action. In this opinion the judge who tried the cause concurred.—Verdict for plaintiff.

6. *HICKS v. HICKS*, M. T. 1802, K. B. 3 East, 16.

The securities for the payment of an annuity had been set aside; and when this action was brought to recover the consideration back, the defendant had set off the payments of the annuity which he had made previously to the application to the Court to vacate the annuity, some of which had been made more than six years ago, and which were greater in amount than the money due from the defendant. The plaintiff did not reply the statute of limitations. Verdict for defendant. A motion was now made to set it aside. Per Cur. The consideration of the annuity was money had and received. The defendant must, therefore, be allowed to set off his payments as money had and received to the plaintiff's use, and to the extent he has done, no objection having been raised on the part of the plaintiff, by pleading the statute. Rule refused. See *Peake*, N. P. C. 109; 5 Ves. 607; 7 id. 23 24; 8 id. 136; 9 id. 492.

7. *BURDON v. BROWNING*, E. T. 1809, C. P. 1 Taunt. 519.

The prothonotary was in this case directed to take an account between the grantor and grantee, of an annuity which was agreed to be rescinded, of all annuity instalments was had been paid, and to consider the price of the annuity as money lent, and to see that the principal and interest were repaid to the grantee. The counsel for the grantee contended, that if it should be found that he had received more than principal and interest he ought not to re-fund. Per Cur. It is most unreasonable to suppose that the instalments of

the annuity are to be converted into principal and interest, and to be considered as part of the consideration money returned. the consid-
eration mo-
ney of an
annuity, with interest, is ordered to be refunded to the grantee, the annuity instalments which have
been paid to a greater amount than the principal and interest, are not to be viewed as part of such
consideration money.

8. *BURDON v. BROWNING*, E. T. 1809, C. P. 1 Taunt. 522.

The plaintiff was the grantee of an annuity which had been set aside. It was moved that he should be allowed such sums as he had paid (out of certain annuity instalments which he had received,) for the insurance of the defendant's life. The application was, however, negatived, because it was not shown that the insurance had been specially agreed to be at the defendant's expense. The premi-
ums of insu-
rance of the
grantor of a
[694]
rescinded
annuity
paid by the
grantee,
cannot be
charged up
on the for-
mer, unless
it appears
that he
agree to
pay them.
Where the
grantor had
apprized
the grantee
of an annui-
ty of cer-
tain defects
in the me-
morial, and
had treated
for a com-
promise on
account of
the insuffi-
ciency of
the annui-
ty, the lat-
ter was al-
lowed to re-
cover back
the consid-
eration, al-
though he
had not tak-
en any steps
to enforce
payment of
the arrears
or deliver
ed up the
securities,
and substi-
tuted new
ones previ-
ous to bring-
ing the ac-
tion.

9. *WATERS v. SIR WM. MANSELL, BART.* T. T. 1810, 3 Taunt. 56.

The defendant in this action, for money had and received, was the grantor of the annuity to the plaintiff. It appeared that six half yearly payments had been made; that he had then become embarrassed; that he had ceased to pay; and that a circular had been sent to the annuity creditors within six years before the commencement of the action, informed them that all the annuities might be set aside for want of form; but that the defendant was willing to make a compromise upon certain terms, and that the purposed compromise was afterwards abandoned. The solicitor for the defendant, when examined, stated that he never knew of specific defects in this annuity; but the plaintiff's solicitor swore that he did know of the specific defects, and believed that the other witnesses possessed the same knowledge. It was contended on the part of the defendant, that nothing was proved to show that the annuity did not still exist; for although a defect was alleged to be in the memorial, the specific defect was not stated; and that unless the annuity was set aside, the plaintiff could not recover the consideration. It was therefore urged, that it was necessary for the plaintiff, previous to bringing this action, to have demanded payment of the annuity, and to have rendered new deeds and delivered up the old ones. The evidence as to the solicitor being apprized of the defects being contradictory, the Court left it to the jury to say whether the defendant had dissented from the annuity or not, with liberty to the defendant to move to enter a nonsuit in case of a finding for the plaintiff, if the Court should be of opinion that it was necessary that any thing more should take place between the parties than that both of them should understand that the securities were void. A verdict was found for the plaintiff. A motion was now made to enter a nonsuit. *Per Cur.* The plaintiff was not obliged to take any of the preliminary steps before suing the defendant, which it had been contended that he ought to have done. Still less was he bound to send back the old deeds which he had in his possession, for they are part of his evidence, to make out his case in an action for the recovery of the consideration. The grantor informed the grantee that there were defects, which is sufficient. See 1 Esp. 309; 3 East, 16.

10. *SCURFIELD v. GOWLAND*, H. T. 1805, K.B. 6 East, 241; S.C. 2 Smith, 232.

The plaintiff was the grantee of an annuity granted by the defendant, secured by a deed, bond, and warrant of attorney, to enter up judgment. Judgment was afterwards entered up, which, along with the warrant of attorney, was subsequently set aside on account of a defect in the memorial. The bond and deed, however, remained uncanceled. The present action had been instituted to recover the consideration money. It had, however, been urged at the trial, that as the deed and bond remained uncanceled, there appeared an existing security for the payment of the annuity, and that the plaintiff could not recover as for money had and received. The plaintiff had been nonsuited. It was now moved to set it aside. *Per Cur.* The plaintiff must recover in this action; one of the securities remaining uncanceled make no difference. The money for the purchase of the annuity is paid in consideration of an annuity to be secured by certain deeds; and if one of them fails, the contract being entire the whole contract fails.—Rule absolute to set aside the nonsuit. 1 T. R. 732; 8 id. 183; 3 East, 500. If several
securities
be given to
insure the
payment of
an annuity
and one of
them fails,
the grantee
may recov-

or back the
considera
money al
though an
other may
remain un
cancelled.
If a decla
ration to

11. COMPTON v. CHANDLESS, E. T. 1801, K. B. N. P. 4 Esp. 18.

In an action by the grantee of an annuity against an attorney to recover the purchase money of the annuity, the declaration charged him with having so negligently prepared the securities, that they were set aside by rule of Court. To prove the latter fact, the plaintiff produced the rule of Court by which the proceedings were set aside; but Lord Kenyon, C. J. was of opinion that the proceedings themselves ought to be produced, and ordered the plaintiff to be called.

recover the consideration of an annuity allege that through the attorney's neglect the securities were set aside by rule of the Court, the production of the rule of Court is not sufficient to prove that the proceedings were set aside.

[695] VII. OF THE SUMMARY JURISDICTION OF THE COURTS OF WESTMINSTER.*

(A) GENERAL RULES.

If there is
neither a
warrant of
attorney or
a judgment
actually en
tered up in
the court to
which appli
cation is
made the
Court can
not grant
its summa
ry interpo
sition;
Or if a judg
ment be ob
tained in
the ordina
ry course
of law on
an annuity
bond.

1. CRAFTON AND OTHERS, EX'RS. v. CAINES, H. T. 1795, C. P. 2 H. BL438.

A fine had been properly levied for the purpose of securing an annuity, but no warrant of attorney or judgment had been given as a collateral security. A motion was made to set the annuity aside on the ground of a defect in the memorial; but *Per Cur.* It is unnecessary to give any opinion as to the alleged defects in the memorial, since we have no jurisdiction over the subject matter. A fine levied does not give us any authority, for it is not an action within the meaning of the statute. There being no judgment or warrant of attorney, we cannot interfere.

2. BUCK AND OTHERS, EXECUTORS, v. TYTE, H. T. 1798, K. B. 7 T. R. 495.

On a rule to show cause why a judgment and execution on an annuity deed should not be set aside, the following facts were disclosed; that the defendant was surety to the testator, and had executed an indenture, bond, and warrant of attorney, for securing the annuity redeemable on certain terms; that the testator dying, the plaintiffs, as his executors, commenced an action against the defendant on his bond, and having obtained judgment therein, sued out execution, and levied thereon. *Per Cur.* The statute does not extend to a judgment obtained in the ordinary course of law. The rule must be therefore discharged.

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3. EX PARTE ANSELL, T. T. 1797, C. P. 1 B. & P. 66, n. a.; S. P. 4 T. R. 694; S. P. id. 695, n.

But the
Courts
have juris
diction to
set aside a
warrant of
attorney
given to se
cure an an
nuity, al
though no
proceed
ings have
been institu
ted in
court.

In this case it was contended, that as the grantee of an annuity had never entered up judgment on the warrant of attorney, given to secure the annuity or instituted any other proceedings in court, that the Court had no jurisdiction to set it aside on account of a defect in the memorial. *Per Cur.* Every warrant of attorney entered is subject to our cognizance, but we cannot in all cases order all the proceedings to be cancelled on account of their being void by the annuity act.†

* The sixth section of the 53 Geo. 3. provides, that if any part of the consideration for the purchase of any such annuity or rent charge, shall be returned to the person advancing the same, or in case such consideration, or any part of it, shall be paid in notes, if any of the notes, with the privy and consent of the person advancing the same, shall not be paid when due or shall be cancelled or destroyed, without being first paid; or if such consideration is expressed to be paid in money, but the same or any part of it shall be paid in goods; or if the consideration or any part of it shall be retained, on pretence of answering the future payments of the annuity or rent charge, or any other pretence, in all and every the aforesaid cases, it shall be lawful for the person, by whom the annuity or rent charge is made payable or whose property is liable to be charged or affected thereby, to apply to the Court in which any action shall be brought for payment of the annuity or rent charge, or judgment entered by motion, to stay proceedings in the action or judgment, and if it shall appear to the court that such practices as aforesaid, or any of them, have been used, it shall and may be lawful for the Court to order every deed, bond, instrument, or other assurance, whereby the annuity or rent charge is secured, to be cancelled, and the judgment, if any has been entered, to be vacated.

† See *Bolton v. Williams*, 4 Bro. Ch. Cas. 310; 2 Ves. jun. 154. S. C.; in which Lord Loughborough said, "The courts of common law, which will upon their general jurisdiction enter into the validity of the warrant of attorney or judgment, upon motion in the particular application under the act, will only set aside the judgment or execution, or vacate the warrant of attorney, but the jurisdiction does not extend to ordering the bond to be delivered up; and if ever done, it has been done inadvertently."

4. CHEEK V. TOWER, M. T. 1808. C. P. 1 Taunt. 372.

Per Cur. A distinction is to be marked in the language used in the statute 17 Geo. 3. c. 26. The expressions used in the first three sections of the act render the instruments, in case of non-compliance with their requisitions, absolutely void. The fourth only vests a discretionary power in the hands of the Court to act according to the bearings of each particular case, and to cancel the deeds, &c. when thought proper.

5. GIRDLESTONE V. ALLAN, M. T. 1822, K. B. 1 B. & C. 61; S. C. 2 D. & R. 150-7.

A rule was obtained, calling on the plaintiff to show cause why an annuity deed, bond, and warrant of attorney, should not be delivered up to be cancelled, and why the judgment on the warrant of attorney should not be vacated, on the ground that part of the consideration money was returned to the plaintiff. It appeared that the plaintiff, who was an attorney, and had at the time two partners, agreed to purchase an annuity of the defendant, in consideration of the sum of 7000*l.* of which part was his own money, and the remainder was advanced by one A. B.; that the firm had, in their bill for the business, amounting to 235*l.*, made a charge thus: "Fee on negotiating the annuity, and for many letters in the course of the business, at 10*s.* per cent. 35*l.*;" that the annuity was granted, and no objection had been made to it until lately. They contended that, inasmuch as the Court had a discretionary power under the fourth section of the annuity act, it would not under such circumstances, set aside the annuity, particularly as the whole amount of the bill was paid into the partnership account, and there was not any appearance of extortion or fraud, and the plaintiff was willing that the annuity should be reduced one-third of its value. *Per Cur.* It is true that the charge made in the attorney's bill cannot be sustained, but there are many mitigating circumstances in this case. The annuity continued for a long time without any objection, and there is now an offer to reduce it one-third. If, therefore, we have a discretionary power, this is a proper case in which to exercise it. That we have such a discretionary power, there can be no doubt, for this transaction is not of a public but of a private nature; and it would be a most mischievous construction to say that all illegal annuities, under whatever circumstances they might have been made, should be altogether set aside. The Court has, in many cases, interposed terms, without its power to do so being questioned. Let, therefore, a rule be discharged, the parties agreeing to reduce the annuity one-third. See 1 Taunt. 372; 4 id. 323; 6 id. 8; 1 Marsh. 407; S. C. 7 id. 596; 2 East, 85; 4 id. 85; 5 T. R. 597; 6 id. 690; 8 id. 328; 2 B. & B. 19; 4 Moore, 402; S. C. 4 B. & A. 281.

6. WITHEY V. WOOLLEY, E. T. 1798, K. B. 7 T. R. 540.

This was an application made to set aside an annuity, but it appearing that an ejectment had been brought to recover the possession of lands extended under an *elegit* upon a judgment confessed, which had been entered upon a warrant of attorney, given for securing an annuity, the Court held that it was then too late for the grantor to object to the consideration of such annuity upon summary application for staying proceedings after verdict in such ejectment, because he had an opportunity of making his defence to the action; and Lord Kenyon, in delivering his opinion, in which the whole Court agreed, said, "No sufficient answer has been given to the objection which prevailed in the case of *Buck v. Tyte*, 7 T. R. 415. that this application ought to have been made sooner. The judgment by confession in the first instance, which was by way of security, concludes nothing between the parties, so far as they were acting together. But as soon as the proceedings became adverse, then the defendant ought to have made his stand. I do not mean to say that his not doing so then operates as a legal estoppel to him afterwards; but if unexplained, it is a reasonable ground for the Court to act upon, in refusing to entertain an application for summary jurisdiction upon his complaint. We ought not to suffer a party to go on in a course of fruitless litigation, to the great expense and vexation of his opponent; but where there is an objection to the proceedings *in limine*, he ought to apply in a reasonable time to stay the proceedings. The ground of

The courts have a discretionary power of interference in cases coming within the 4th section of the stat. 17 G. 3. c. 26. The words of the act, "it shall and may be lawful for the Court to or [697] der to set aside, &c. are not compulsory, but give discretionary power to the court over annuities. Where, therefore, the attorney who negotiated the annuity and was paid a bill for do ing it, advanced part of the money and charged a percentage for procuration on his money; the Court exercised that discretion. After judgment upon a warrant of attorney, given for securing an annuity, the Court held that the way of security granted could not object to the consideration up ed, it is a reasonable ground for the Court to act upon, in refusing to entertain an application for staying the proceedings. The ground of

our decision in this case is the acquiescence of the defendant under a judicial proceeding.

7. *GREATHEAD V. BROMLEY*, H. T. 1798, K. B. 7 T. R. 455. S. P. SCHUMANN V. WEATHERHEAD, T. T. 1801, K. B. 1 East, 537.

Upon a summary application to set aside an annuity and the instrument by which it was secured, for non-compliance with the requisites of the statute 17 Geo. 3. c. 26. it appeared that a prior application had been made, and in support of which the same grounds of objection had been taken as were now intended to be raised. *Per Cur.* The annuity act gives a summary jurisdiction to the Court, which is to be exercised according to its discretion.

Now in this case, as it appears that all the facts brought forward in the affidavits in support of the present rule existed at the time of a former rule, and every objection which could, at this moment be urged, might then have been brought forward, the question intended to be raised must be taken to have passed in *rem judicatum*, and the former decision conclusive between the parties.

Where a former rule for setting aside an annuity was discharged, upon a decision of the Court will not entertain the objection on a subsequent rule, where the same facts existed within the knowledge of the same parties, at the time of the former rule pending.

Every rule nisi to set aside an annuity must contain the several objections to be urged by counsel when making the rule absolute.

(B) HOW APPLICATION TO BE MADE.

1. RULE OF COURT, T. T. 1802, K. B. 2 East, 569.

It is ordered that every rule nisi to set aside an annuity must contain the several objections intended to be insisted on by the counsel at the time of making the rule absolute.

2. *DARTNALL V. MARQUIS OF WELLESLEY*, E. T. 1822, C. P. 3 B. & B. 255; S. C. 7 Moore, 63.

An affidavit was made by the defendant's trustees, upon which it was moved to set the annuity in this aside for an illegality in the payment of the consideration. *Per Cur.* No affidavit is made by the defendant himself of the facts urged by the trustees as grounds for setting aside the annuity. The trustees cannot be supposed to be so well aware of the original transaction between the parties as the grantor himself. This application therefore rested solely on a statement by third parties, we cannot interfere.

2. *AMSTEAD V. ATKINS*, T. T. 1813, K. B. 2 Chit. Rep. 32.

A rule nisi was granted to set aside a judgment entered up on a bond given to secure an annuity, on account of a defect in the memorial; but as eleven years had been suffered to elapse since the annuity was granted, Le Blanc, J. laid it down that the affidavits in support of the application ought to state that all the parties were alive.

And after the lapse of 11 years the affidavits in support of an application to set aside a judgment, entered on a bond given to secure an annuity were required to state that the parties were all alive.

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VIII. OF THE REMEDY FOR THE RECOVERY OF ARREARS AND PLEADINGS AND EVIDENCE CONNECTED WITH.

(A) FORM OF ACTION,* AND WHEN MAINTAINABLE.

1. *DAVIS V. SPEED*, M. T. 1694, K. B. 2 Mod. 143; S. C. Carth. 262; Yelv. 208. contra.

In a debt on an annuity deed the defendant demurred; 1st. Because the bill was in debt, and the declaration for the arrears in annuity, which is a material variance, the judgment being different; 2d. That no action of debt is supportable for an annuity for life. *Per Cur.* Both the objections are un-

* An action of annuity was the ancient remedy for the recovery of arrears, and is maintainable for a yearly payment of a certain sum of money granted to another in fee for life or years, charging the person of the grantor only, and it may be brought by the grantee or his heirs, or his or their grantees, against the grantor or his heirs; Co. Litt. 144. b. This remedy is at present out of use being superseded by the action of debt or covenant. The former remedy, however, is preferable to covenant, because in debt the judgment is final in the first instance; and where a bond has been given, as well as the grantor's covenant, it is more advisable to declare in debt on the latter; for if the plaintiff proceed on the bond, damages must be assessed in pursuance of the stat. 8 & 9 W. 3. c. 11. s. 8. which causes expense and delay. See *Precedents, Peterdorff's Index*, 21.

tenable; for though no action lies for an annuity for life, or for an annuity for years, still, as the bill and declaration are the same in annuity as in debt, judgment must be given for the plaintiff.—Judgment for plaintiff. See *Brendlop v. Phillips*, Cro. Car. 895; *Lucas v. Fulward*, 1 Bulst. 151; *Acherley v. Vernou*, Fortes, 188; *Skin*, 66; *Yelv.* 208; 9 Mod. 243; *Fitz.* 85.

2. *PILTON v. DARBY*, T. T. 1686, K. B. Comb. 57.

In debt for two quarters' arrears of an annuity before the whole term was ended, a motion was made in arrest of judgment, on the ground that the action did not lie. On the other side it was insisted that the case of *Brown and Petlebury*, Cro. Jac. 268, was decisive in favour of the action.—Plaintiff had judgment.

But debt lies for the arrest of an annuity.

3. *WEBB v. JIGGS, AND MARTHA, HIS WIFE*. E. T. 1815, K. B. 4 M. & S. 113.

A. B. bequeathed an annuity by will to the plaintiff, charged upon freehold lands, which were devised to the defendant for their lives, paying thereout the said annuity. The plaintiff declared in debt that while the defendants were so seised in fee as aforesaid, an instalment became due, and was still in arrear. Demurrer, showing for cause that debt did not lie in this case either at common law, or by the 8th Anne, c. 14. s. 4. Joinder. *Per Cur.* Although it has been allowed at the bar that this action cannot be supported for a rent or annuity in fee, in tail, or for life, while it continues a freehold interest, yet it has been contended that such a rule of law is only applicable to legal common law estates, and not to devises by will founding the argument on what is reported to have been said by Lord Holt, in *Ewer v. Jones*, 2 Ld. Raym. 937. But these observations apply only to legacies or sums of money, not to annuities; and it is also worthy of observation that if the legatees were deprived of an action of debt, founded on the statute, in the case of a legacy payable out of land, he would be completely remediless, because he has his remedy by assize. It has been also urged that the present action comes within the provisions of the stat. 8 Anne, c. 14. "for the better security of rents and to prevent frauds by tenants." But that proposition is equally groundless. An original privity does not exist between the defendant (the devisee of the land charged with the present annuity) and the plaintiff (the devisee of the annuity charged thereupon) as subsists between a lessor and a lessee. Upon both these grounds the action cannot be supported. See 4 Rep. 486; 6 id. 56. b; *Fitz. N. B.* 195. 203; *Co. Litt.* 144. b; 2 Leon. 33; *Plowd.* 467; 1 Rol. Ab. 348. X; 2 Lord Raym. 937; 2 Salk. 415; 6 Mod. 27; 5 T. R. 690. 4. *KELLY v. CLUBBE*, M. T. 1821, C. P. 6 Moore, 345; S. C. 3 B. & B. 130.

An action of debt can not be maintained for the arrears of an annuity charged upon lands devised for life to B. so long as the estate of freehold continues. [700]

It was contended in this case, that although, according to the decision of *Webb v. Jiggs*, it was clear that by the common law an action of debt was not maintainable for the arrears of an annuity in fee tail or for life, issuing out of freehold lands, so long as the estate of freehold continued, yet that, as in the present instance, it did not appear on the face of the declaration that the defendant had a freehold in the premises charged with the annuity, but merely that the annuity was to be payable out of certain premises, an action of debt could be maintained, as there was no reason to suppose but that the grantor was only possessed of a term of years, in respect of which an action would lie. It was also urged, that even allowing the former proposition to be untenable, the present action would be supported on an averment in the declaration, which alleged that certain arrears of the annuity had accrued due, and that the grantors received the rents and profits of the lands to the use of the grantee. *Per Cur.* The action must altogether fail. It must be presumed that the grantor of the annuity had a fee in the premises, where nothing to the contrary appears.

And that rule was held, *ex demurrere* to apply even where the declaration did not aver that the grantor had a freehold in the premises out of which the annuity was payable, as it must be presumed that he had where nothing appears to the contrary. Where a contract recited that it had been agreed to sell an annuity, but contains no

5. *IN RE LOCKE, A BANKRUPT*. E. T. 1823, K. B. 2 D. & R. 603.

An agreement appeared to have been made between the bankrupt and certain other parties for the sale and purchase of an annuity, secured upon property in possession of the grantor, but which contained no words of present grant. It appeared that it was not enrolled. The Vice-Chancellor sent a case for the opinion of the Court; whether it was a grant of an annuity upon

contains no

words of positive grant, it was held that an action at law could be maintained [701] for the arrears of such annuity, in case the instrument had been memorialized. In debt for an annuity granted by the defendant to plaintiff for life, "the same be personally demanded," the demand is not traversable.

[702] On an issue whether the memorial of an annuity has stated the consideration it can not be impeached on the ground that the true consideration has not been paid. An averment in the issue that the grantee had paid the consideration money of an annuity to one of the grantors, is supported by evidence that

which an action at law could have been maintained for the recovery of the arrears of the annuity, even if it had been memorialized.

Per Cur. The case of *Field v. Smith*, 14 Ves. 491. has decided that the grant of an annuity must be by deed, and that the word "grant must be used in the instrument. In the present instance there are no positive words of grant immediately and presently. The instrument is altogether prospective. No action at law could have been therefore maintained, even if an enrolment of the memorial had been made. See *Viner's Abridgment*, tit. Annuity, 506. C. 9. citing *Co. Litt.* 145.

(B) PLEADINGS AND EVIDENCE CONNECTED WITH.

1. *HOPE v. COLMAN*, H. T. 1704, C. P. 2 Wils. 221.

In an action of debt an annuity had been granted by the defendant to the plaintiff, the plaintiff declared that the defendant, by a certain deed poll, for the better support, provision, and maintenance of the plaintiff, then a faithful servant of him, the defendant, and for other good causes and considerations, did grant to the plaintiff one annuity of yearly payment of 40*l.* for the term of her natural life, to be paid quarterly at the defendant's mansion house in I. whereby the plaintiff was seised of the said annuity or yearly rent of 40*l.* in her demesne, as of freehold, viz. for the term of her natural life, and that an arrear became due, &c. and had not been rendered and paid by the defendant. The defendant cravedoyer of the deed, whereby it appeared that the defendant had covenanted to pay the annuity to the plaintiff during her natural life, if the same should be personally demanded by the said E. Hope; and there was a proviso that if the grantee, the plaintiff, married with any person in the life time of the defendant without his approbation and consent in writing, the annuity should cease, and the deed thereupon be void. The defendant then protesting that he was always ready to pay, pleaded; 1st. That the plaintiff did not personally demand the annuity at the defendant's. 2d. With a like protestation of his readiness to pay, that the plaintiff did not demand the annuity personally of the defendant. The plaintiff demurred generally to each of the defendant's pleas; and after joining in demurrer, the defendant objected, 1st. That the whole deed was before the Court, and ought to be taken together, and the personal demand to be coupled with the grant. 2d. That in the declaration it was laid that, by virtue of the grant, the plaintiff became and was seised of the annuity in her demesne, as of freehold, which was ill, this being a grant of a mere personal thing, and not a rent issuing out of land. *Per Cur.* The grant is substantive, and so is the covenant substantive, and the demand on this action is not traversable, whatever it might have been if an action had been brought in covenant; but we think it would not be traversable even in that case, as it is contained in a parenthesis in the deed. As to the manner of pleading in the declaration, that the plaintiff was seised of the annuity in her demesne, that is a mere matter of form; and this being upon a general demurrer, it is aided by the statute 4 & 5 Anne.

2. *FRACO v. LINDO*, H. T. 1795, K. B. N. P. 1 Esp. 300.

In an action for the arrears of an annuity, one of the issues was, whether the memorial had truly set forth the consideration, it stating that 300*l.* had been paid, whereas the defendant alleged that it was part money and part a debt which had been lost at play; upon this it was contended that the plaintiff had not proved the issue. But *Per Buller, J.* That the evidence adduced supports the issue, since the question is not whether the consideration money has been properly described in the memorial, that being a mere question of law; but the point is, whether the consideration for the annuity has or has not been paid.

3. *COARE v. GIBLETT*, M. T. 1803, K. B. N. P. 4 Esp. 230.

In debt on an annuity bond to secure the payment of a joint annuity for 1400*l.* one of the issues alleged that the purchase money had been paid by the plaintiff himself, to the use of the grantors; and the memorial stated, that on the 24th of December, 1796, the sum of 1400*l.* was paid by the plaintiff to one D. S. (one of the parties) to the use of the grantors, who paid it into a

banker's in his and the plaintiff's attorney name, until the deeds were executed. For the defendant it was contended that the terms of the annuity act had not been complied with, as it required the parties' name by whom the money was paid to be set out. Now here it appears by the issue to have been paid by the plaintiff, whereas it was paid by a banker's check and by his attorney. Per Lord Ellenborough, C. J. I am of opinion that the issue is supported by the evidence, especially as the consideration money was paid to D. C. who is one of the grantors, the day mentioned in the issue.

it was deposited in the grantee's bank, in the name of his attorney and one of the grantors.

4. AMHURST v. SKYNNER, E. T. 1810. K. B. 12 East, 263.

A replication in an action in which the question was raised whether it was necessary to enrol the memorial of an annuity secured upon mortgaged lands in fee,* to a plea which stated that the grant was made after the 17 Geo. 3. c. 26. and that no memorial was enrolled according to the statute, alleged that the plaintiff was at the time of making the grant seized in fee simple, in possession of the premises upon which the annuity was charged, and which were then of greater annual value than the annuity. Rejoinder traversing that fact. Under these circumstances, after a verdict had been found for the annuitant, the opinion of the Court was given in confirmation of the verdict, although it had been contended that the allegation in the pleadings, that the plaintiff was seized in fee, must be taken to mean that he was seized of the legal estate in fee, whereas an equitable seisin was only proved, which did not support the averment. But the Court held that although by such an allegation a legal seisin would be understood, yet when the words seized in fee were coupled with the memorial of the annuity supposed to be acquired according to the act, they must be construed *secundum subjectam materiam*. They are, therefore, the same as if the averment had been "that he was so seized within the meaning of the annuity act;" and that statute including equitable as well as legal seisin, the pleadings are sufficient. The statute, alleged that the annuity was charged upon lands of greater annual value, of which the grantor "was seized in fee simple," by means of which an enrolment was not requisite; it was held that these words must mean such an estate as the act deems a seisin in fee.

The words "seized in fee simple," in general must be construed a legal seisin yet where a replication traversing a plea which averred that the grant of an annuity was made after the annuity act, and that no memorial was enrolled according to the statute, the grantor

5. HAW V. OGLE. T. T. 1811. C. P. 4 Taunt. 10.

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In an action of covenant to recover the arrears of an annuity, the defendant pleaded, that at the time of entering into the indenture to pay the annuity, one A. B. who had become jointly and severally liable with him, was an infant under the age of 21. General demurrer and joinder. Per Cur. The annuity cannot be set aside on such grounds. The legislature not only made such a contract by an infant void, but void although the infant wished to confirm it after he attained his majority. But although void *ab initio* to all intents and purposes, as to the infant, his co-contractor cannot avail himself of such a fact to deprive the grantee of the annuity of his remedy to recover payment.—Judgment for plaintiff.

The infant of one of two joint and several grantors of an annuity cannot be set up as a defence to an action of covenant brought against the other. Formerly when judgment was entered up to secure an annuity, a second execution might have been sued out for subsequent arrears with out a *scire facias*, at any time within a

(C) JUDGMENT AND EXECUTION.

1. HOWEL V. HANDFORTH. M. T. 1772. C. P. 2 Black 843.

On the failure of the payment of an annuity of 80*l.* per annum, secured by warrant of attorney, judgment was entirely up in Hilary term, 1768, and a writ of *fiery facias* was then sued out, marked to levy 30*l.* (a quarterly payment,) which was accordingly done. In Easter term 1768, another *fiery facias* was sued out, but satisfied before execution, and the annuity was regularly paid up to Midsummer, 1771, when the defendant making default another *fiery facias* was sued out in Trinity vacation, marked to levy 73*l.* The condition of the bond did not appear on record, nor was any suggestion made on the roll of the subsequent arrears, or *scire facias* sued out under the statute 8 & 9 W. 3. c. 11. but continuances were regularly entered on the roll. Upon a motion to set aside the *fiery facias*, the Court inclined strongly to think that though at common law, if the sheriff only levies part of a debt on a *fiery facias* marked for the whole, the plaintiff may have subsequent writs till the whole is levied; yet the plaintiff shall not mark it for part, and afterwards sue out subsequent

* It has been since decided to be unnecessary. See 12 East, 263; 7 T. R. 194; 2 Bra. Ch. Cas. 268.

year after they were incurred, and even afterwards if the first writ of execution had been properly continued down. But under such an execution the plaintiff could not levy the whole penalty in the bond, but only the arrears then due, and the judgment to stand as a security for future arrears.

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And where judgment had been entered on a warrant of attorney to secure an annuity and the arrears were levied, on a second quarter becoming due, *fiery facias* issued, without reviving the judgment, the execution was held regular.

writs for the residue; which would tend to great oppression. But, on mentioning the cause of Marsen and Touchet, 2 Blac. 700. they made a rule, that on payment by the defendant of the arrears due, and all costs, the *fiery facias* should be set aside. The judgment to stand as a security for future arrears, with liberty to apply to the Court, from time to time, to sue out fresh executions thereon.

OGILVIE v. FOLEY, T. T. 1775. C. P. 2 Black, 1111.

Judgment had been entered on a bond in the penalty of 2,100*l.* for securing an annuity of 150*l.* and the plaintiff sued out a *fiery facias* and levied out the whole penalty. The Court made a rule to refund the overplus beyond what would satisfy the arrears of the annuity; and that the judgment should stand as a security, with liberty to take out execution as future arrears should arise. See 1 H. Bl. 297.

3. SCOTT v. WHALLEY, M. T. 1789. C. P. 1 H. Bl. 297.

After the entry of a judgment on a warrant of attorney to secure an annuity payable quarterly, a *fiery facias* issued for the arrears of the preceding half year, and a levy was made the next quarter; another *fiery facias* was issued out, and a second levy, but the judgment had not been revived. On a rule to show cause why levy under the latter execution should not be set aside, on the ground that the judgment ought to have been revived by *scire facias*. *Per Cur.* The rule must be discharged, as it is not necessary to revive the judgment in order to sue out the second execution.—Rule discharged.

4. HOWEL v. HANSFORTH, T. T. 1775. C. P. 2 Blac. Rep. 1016.

The Court will, under equitable circumstances, permit execution to be sued out for the proportional arrears of an annuity accrued since the preceding quarter.

The annuitant, wife to the defendant, being dead, it was moved for leave to take out execution for the proportional arrears of the annuity since the last quarter day. The cause shown was, that nothing was due since the last quarter day, either by the condition of the bond or by any rule of court. Annuities are not subject to apportionments, like rents, by the statute 11 Geo. 2. c. 19. s. 15. but *Per Cur.* Though the rents and annuities are not in general apportionable by the common law, yet where an annuity is secured by a bond which becomes forfeited by any non-payment, the annuitant may sue upon the bond, and levy the penalty, subject to the equitable interposition of the Court. In this case the plaintiff did not choose to levy the whole penalty at once, but after judgment took out several *fiery faciases* as arrears became due: the legality of which practice being questioned, the present rule was entered into, by consent, about three years ago, that the judgment should stand as a security, with leave to apply to the Court to take out process of execution, from time to time, whenever any arrears should accrue. In this situation the Court will guide its discretion by the same rules as if at first execution had been taken out for the whole penalty; and though the rents and common annuities are not apportionable either by law or equity, yet in equity the maintenance of infants is always apportioned up to the day of their deaths, &c. because it would be difficult for them to find credit for necessities, if the payment depended on their living to the end of their quarter. This case depends on similar principles, the annuity being for a separate maintenance to a feme covert; and as it appears that the quarterly payments were not originally forward payments by way of maintenance for the ensuing quarter (which might make a difference,) but payable at the end of each quarter, in order to discharge the expences incurred in the three preceding months, we think it ought to be apportioned.—Rule absolute.

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Where an interlocutory judgment had been entered up in an action of covenant for the arrears of an annuity, the Court granted a rule for reference to the master to compute the arrears.

5. ALLOURWAY v. HILL, T. T. 1817. K. B. 2 Chit. Rep. 32.

Interlocutory judgment had been signed in an action brought on a covenant in an indenture for securing the payment of an annuity to recover a year's interest. A rule nisi had been obtained to refer it to the master to

compute what was due for the arrears, and that the plaintiffs should be allowed to sign final judgment. The Court made the rule absolute.*

IX. RIGHTS OF PRINCIPAL AND SURETY.

1. PAGE v. BUSSULL. E. T. 1814. K. B. 2 M. & S. 551.

Plea *actio non* to a suit for money lent, paid &c. "that the defendant was discharged under the insolvent debtor's act, 51 Geo. 3. c. 125. and that the sums of money in the declaration mentioned, were paid by the plaintiff as surety, in respect of an annuity granted before the first of May, 1811, mentioned in the act. Replication that after the said 1st of May, and after the discharge of the defendant, the plaintiff was obliged to pay the said sums. Demurrer and joinder. *Per Cur.* It has been contended that by analogy to the 49 Geo. 3. c. 121. s. 17. with reference to bankrupts, that the present defendant is discharged. But the insolvent act, 51 Geo. 3. only enables the creditor of any debtor who shall be discharged, for any sums payable for any annuity at any future times, to be admitted a creditor, and receive a dividend in the same manner as if the debtor had become bankrupt, and does not say that the debtor shall be discharged in the same manner as if he had become a bankrupt. But even in the case of a bankrupt if the annuity creditor sues his surety in preference to proving under the commission, the latter cannot plead the certificate of his principal so as to exonerate himself from all liability; and not being able to do so, it is therefore reasonable that he should be enabled to support an *actio* against his principal. Judgment must be given for the plaintiff. *Sed vide* 1 Geo. 4. c. 119.

2. WELSH v. WELSH AND ANOTHER, T. T. 1815. K. B. 4 M. & S. 333.

The surety under an annuity deed had been compelled by the annuity creditor, after the principal had become bankrupt, and obtained his certificate, to pay arrears due subsequent to issuing the commission; an action was now brought against the principal to recover these arrears. A rule nisi had been obtained to discharge the defendants on common bail. *Per Cur.* The annuity creditor may or may not prove, at his election, under the commission; and the 17th section of the annuity act only applying to the annuity creditor, and not enabling the surety to come in and prove, the claim not being a debt *quoad* the surety until he is in a condition to be damnified by it, the present rule must be discharged. It has indeed been contended that this case is within the 49 Geo. 3. c. 121; but we negative that; for this was not a debt at the time of issuing the commission, nor was the surety forced to pay until after the certificate.—Rule discharged.

See 13 East. 427; 1 D. & R. 521; 5 B. & A. 852; S. C. 3 B. & A. 13. 4 Taunt. 460. 854, 49 Geo. 3. c. 121; 1 Geo. 4. c. 119; and Petersdorff, on Bail, 97.

3. COKE AND ANOTHER, EXECUTORS OF CRICK v. BRUMMELL AND RADCLIFFE. T. T. 1818. C. P. 2 Moore. 495. S. C. 8 Taunt. 439.

The defendant Radcliffe, as surety for Brummell, executed with him a joint bond and warrant of attorney to secure an annuity to the plaintiff's testator. Some time after the execution of these instruments, it was discovered that Radcliff's christian name had been omitted in the body of those instruments. It appeared, however, that the name was afterwards inserted by the attorney for the grantee, and the instruments re-executed by Radcliffe. In pursuance of the warrant of attorney, a joint judgment had been entered up against both defendants. An action had been subsequently brought on the bond in the Court of King's Bench against Radcliffe, who pleaded the judgment in his discharge. A rule nisi was now obtained to set aside the judgment and warrant of attorney, on the ground of the irregularity in the execution of the securities. *Per Cur.* We must discharge this rule. The warrant of attorney would have been even good without the alteration that has been made; and looking at the state of the instruments as they now appear before us, we are clearly of opinion that the arguments adduced in favour of the defendant can-

* And a similar rule to order may be obtained in actions on covenants for the payment of a sum certain: Doug. 316; 8 T. R. 326. 410; 6 Taunt. 356; but not where the sum is undivided: 2 Wils. 6; 4 T. R. 493; 5 id. 87; 14 East. 622.

he had subsequently a voided himself by pleading it in his discharge to an action on the bond, the Court refused to interfere. See 11 Rep. 27.

The surety under an annuity deed may maintain an action against the principal for the value of an annuity redeemed by him subsequently to the bankruptcy. **4. FLANAGAN V. WATKINS, M. T. 1819. K. B. 3 B. & A. 186.**

The question proposed in this case for the opinion of the Court, was, whether a surety who had redeemed an annuity subsequently to the bankruptcy of the grantor was entitled under the 49 Geo. 3. c. 121. to sue the grantor upon a bond of indemnity, although the grantee had proved the value of the annuity under the 17th section. *Per Cur.* The surety has brought his action to recover from the defendant the sum paid for the redemption of the annuity upon a bond of indemnity; to which the defendant has pleaded his bankruptcy and certificate. It has been urged that the 17th section of the 49 Geo. 3. c. 121. which relates to the proof by the annuity creditor of the value of annuities, made the value of an annuity "a debt," within the meaning of the 8th section of the statute which relates to the proof of debts by securities. But the right of a surety under the 49 Geo. 3. c. 121. who has paid the annuity creditor the whole or in part to stand in his place as to the dividends receivable under the commission of the principal who has become bankrupt, depends upon the proof of the creditor, over which the surety has no controul; and if the surety has himself made any payment on account of such annuity, he has an independent right to prove in respect thereof as a debt under the 8th section. But in this case we are of opinion that the surety cannot prove the value of the annuity redeemed by him subsequently to the bankruptcy, it not being "a debt," within the meaning of that word. The 17th section, enabling the annuity creditor to prove such value, is applicable in its terms only to the grantee of the annuity, for he is only an annuity creditor, and not applicable by the surety. Judgment must be therefore given for the plaintiff. See Cro. Jac. 127; 1 G. & J. 199.

[707] **5. WILLIAMSON V. SIR G. GOOLD, T. T. 1823. C. P. 1 Bing. 274.**

The defendant had obtained an order for setting aside a judgment signed by the plaintiff to secure an annuity as for one Henry Michael Goold, on which he the defendant had been taken in execution upon the terms of entering into an account and paying the balance due; and Henry Michael Goold having himself succeeded in setting aside the annuity deed, upon payment what should be ascertained to be due for principal and interest. A rule nisi was now moved for and obtained, calling on the plaintiff to show cause why the defendant should not be discharged out of execution, although he had not accounted or paid any money into court under the former rule. *Per Cur.* The rule in this particular case is still in force. Without going into the account, or paying money into Court, subject to an account being taken, we cannot accede to the present application.—Rule discharged.

6. WILLIAMSON V. SIR G. GOOLD, H. T. 1823. C. P. 1 Bing. 171.

A rule was obtained calling on the plaintiff to show cause why the writ of execution issued in this cause should not be set aside upon payment of the balance due. The facts of the case which gave rise to the application, as disclosed by the affidavits, were as follows: Henry Michael Goold granted to the plaintiff an annuity of 590*l.* in consideration of 4130*l.* obtained through the medium of Howard and Gibbs, annuity brokers to be secured on certain estates in Ireland, conveyed to Howard in trust, and on the defendants' warrant of attorney as a collateral security. Upon that warrant of attorney judgment had been signed against the defendant, and he had taken into execution for the arrears of the annuity then supposed to be due. The defendant denied his liability to the payment of the whole of the sum claimed, on the ground that since he was taken in execution he had received a notice from the assignees of the estate of Howard and Gibbs, that the bankrupts had advanced the sum of 3213*l.* to the plaintiff on the credit or security of the annuity,

and which required the defendant not to pay any part of the said sum to the plaintiff, or to any person but the bankrupts' assignees. It appeared that the fact of the rents received by Howard and Gibbs from the estates in Ireland not being sufficient to pay the annuity, had induced them to advance to the plaintiff out of their own funds the said sum of 321.3*l.* in full confidence that the arrears of the annuity would be ultimately paid either by the grantee or his surety. They had, however, retained a commission of two and a half per cent. thereout from the annuitants. The defendants now claimed to be entitled to the benefit of these payments by Howard and Gibbs to the annuitants. *Per Cur.* An application on behalf of a surety is entitled to our favorable consideration. By the agreement of the parties, Howard and Gibbs were not strangers, but agents in this transaction; and this view of the case disposes of the argument adduced from the cases of *Butt v. Conant*, 3 B. & B. 3. and all other decisions where the payment was not made by an agent. If, then, the annuity, or any part of it, be liquidated in any way by payment specifically made on account of such charge, the benefit of them must be allowed to the defendant; and it is clearly established in proof that the plaintiff has been paid a considerable sum. But it is said that this payment was not made by Howard and Gibbs out of the funds of the grantor; but by anticipation out of the funds to be received for payment of the annuity; and a question has been made whether they can recover against the grantor. That they can do so in some shape or other is perfectly clear; against the surety it might be different. It has indeed been said that Howard and Gibbs' assignees can avail themselves of this security, but this we deny, as against the principal and still more against the surety, either in law or in equity. This payment seems therefore to be evidently made on account of this particular annuity. Had the money been advanced by way of loan, it could not be doubted but that there would have been some agreement for interest until repayment of the arrears, or some memorandum empowering Howard and Gibbs to use the name of the plaintiff in enforcing the judgment. Had, however, Howard and Gibbs merely lent and advanced him the money, not on account of the annuity, then it might have been a different case, but the money is not pretended to have been advanced in this way. But it is said further that this is an equitable right; admit it to be so, still, in this course of proceeding against the surety, there must be a legal right to avail themselves of this security. Rule absolute for the discharge of the defendant, on his bringing into court the balance appearing due, after giving credit for the advances. See 9 East, 72. Park on Ins. 641.

7. *CARROL V. GOOLD*, H. T. 1823, C. P. 1 Bing. 190.

A similar application was made as in the preceding case, the defendant, the grantor of the annuity, having been taken in execution upon a warrant of attorney given to confess a judgment in case of the annuity being in arrear. Upon this case coming on to be argued, and it appearing that the estates of the rents of which Howard and Gibbs had been appointed receivers, and on which the annuity was charged, were insufficient to pay the annuity, or reimburse them the money they had advanced; it was contended that this case was distinguishable from the preceding, and that therefore the defendant was liable.

Sed per Cur. On the best consideration we have been able to give to the opinion recently delivered by us we think proper to adhere to it. But there is a distinction assigned, that this is a case of a principal, and not of a surety. Now between the case of a principal and a surety there may be both in courts of law and equity, many essential distinctions, but in this case it can make no difference whatever. The substance of the affidavit of Gibbs clearly shows that this was a payment made by them, not out of the arrears, but for the arrears of the annuity for a benefit of two and a half per cent. to themselves. Until therefore the plaintiff had been compelled to refund he has no claim on the defendant. We can never suffer a plaintiff to take out execution against a defendant when he has once received the money, and thereby got his debt liquidated. The principles of law concur with justice in this case, and the rule must be made absolute.—Rule absolute.

security. The annuity becoming considerably in arrear, the agents who negotiated the business between the grantor and grantee advanced to the latter a large sum of money [708] out of their own private funds in anticipation of the accruing rents of estates on which the annuity was secured. deducting the usual commission. Held that such advances must be considered as payments made on account of the principal, and operate to the extinguishment of the liability as the surety. So where similar advances had been made under similar circumstances, the Court set aside an execution which (the rents proving insufficient) the grantee is sued for these advances against the grantor.

But in such cases the Court will allow the grantee his expenses in carried with reference to the conveyancer of the annuity.

A bond for the absolute payment at fixed period of an annuity for a term of years is proveable under a commission issued against the grantor of an annuity.*

8. WILLIAMSON v. GOOLD, T. T. 1823, C. P. 1 Bing. 316.

Where the annuity was set aside, and the prothonotary was directed to ascertain what was due for principal and interest at 5 per cent. the Court determined that the grantee was entitled to all fair and bona fide disbursements connected with the conveyancing for effecting and securing the annuity.

X. REMEDIES IN CASE OF BANKRUPTCY OR INSOLVENCY.

(A) IN CASE OF BANKRUPTCY.

1. PATTISON v. BANKEs, M. T. 1777, K. B. Cowp. 540; S. C. cited 1 Doug. 165. n. note 12.

This was an action of debt upon bond dated the 15th of May, 1770; conditioned for the payment of an annuity; the defendant pleaded bankruptcy. Upon the bond being produced in evidence, the condition recited a lease for a term of years, commencing in the year 1761, from the bishop of Carlisle to Hole and others, which by assignment vested in the plaintiff's testator. The plaintiff's testator assigned this lease to the defendant for an annuity, and the condition of the bond was for the regular payment of the annuity during the residue of the term, and for the performance of covenants. At the trial it was proved that the lease had been surrendered to the bishop, so that the bond stood merely as a security for payment of the annuity. At the time of the act of bankruptcy and the commission issued, the penalty was not forfeited, the annuity having been regularly paid up to that time. A verdict was given for the plaintiff, subject to the opinion of the Court on this question. Whether this was a security within the statute 7 Geo. 1. c. 31. all the payments being fixed at certain periods, though the bond itself was not, was given

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* The 49 Geo. 3. c. 121. § 17. enacts "that it shall be competent to any annuity creditor of any person against whom a commission of bankruptcy shall issue after the passing of this act, whether the same shall be secured by bond or covenant, or by whatever assurance or assurances the same shall be secured, and whether there shall or shall not be, or have been any arrears of such annuity, at or before the time of the bankruptcy, to prove under such commission as a creditor for the value of such annuity, which value the commissioners shall have proved and are hereby required to ascertain, and the certificate of every bankrupt under whose commission such proof shall be or might have been made, shall be a discharge of such bankrupt against all demands whatever in respect of such annuity, and the arrears and future payments thereof, in the same manner as such certificate would discharge the bankrupt with respect to any other debt proved, or which might have been proved under the commission. Previous to the above enactment, a bankrupt continued liable after his certificate for all the annuities which were secured by bond, and not forfeited before the bankruptcy. Fletcher v. Bathurst, 7 Vin. 71; Cottrell v. Hook, Doug. 97. To remedy this evil, the preceding act was introduced by the legislature. As the statute has so materially changed the law, connected with the subject of annuities under a bankruptcy, instead of abridging the cases, which are inapplicable to the existing law, it is intended in the following note merely to give the leading principles as extracted from the decisions in equity as well as in the courts of law.

An annuity for life secured by an instrument with a penalty which has been once forfeited before the bankruptcy of the grantor, the whole value of the annuity is a debt proveable under a commission of bankruptcy against the grantor. Ex parte Le Compté, A. D. 1738. 1 Atk. 251; ex parte Belton, A. D. 1744, 1 Atk. 251; ex parte Barrow, A. D. 1738. 1 Bro. 268. The annuity is ordered to be valued and the annuitant to be admitted a creditor for that value. Ex parte Artis, 2 Ves. 489. If an annuitant on the day when a quarter's arrears are due, draw a bill at 25 days' date upon the grantor for the arrears, and the bill is accepted by the grantor who becomes a bankrupt before it is due, such acceptance has been held by the commissioners under a commission of bankruptcy against the grantor to be a sufficient payment of the arrears to prevent the forfeiture of the penalty, so as to entitle the annuitant to prove the value of the annuity under the commission of bankruptcy. Ex parte James, 5 Ves. jun. 708. See ex parte Bennet, 2 Atk. 257. The annuitant's acceptance of arrears is not a waiver of the forfeiture of the penalty. See ex parte Winchester, in ex parte Groome, A. D. 1744. 1 Atk. 115; Perkins v. Kempland, A. D. 1776. 2 Blacks. 1106; Wyllie v. Wilks, A. D. 1780, Doug. 519; ex parte English, A. D. 1789. 2 Br. 609. The annuity must be valued, and the time during which the annuity has been enjoyed is to be taken into consideration, estimating the value. Ex parte Le Compté, 1 Atk. 251. See ex parte Cator, Bro. 267. If an annuity is secured both by a covenant and by a bond, with a penalty which is forfeited, it is optional with the annuitant whether he will prove his debt under the commission or proceed at law. Cottrell v. Hook, Doug. 97. If an annuity for life, payable at fixed periods, is secured either by covenant or by a bond, with a penalty, which is not forfeited before the bankruptcy of the grantor, the arrears accrued or to accrue after his bankruptcy are not proveable under the commission of bankruptcy issued against him. Fletcher v. Bathurst, 7 Vin. 71. In this case there were three

for goods sold and delivered, or for a debt contracted in the course of trade, &c. After argument, *Per Cur.* We are of opinion that this debt is within the statute. The act of 5 Geo. 2. c. 30. § 22. shows that the legislature took for granted that the stat. 7 Geo. 1. c. 30. is not merely confined to securities for goods sold and delivered in the course of trade; but that it extends generally to all personal securities for a valuable consideration when the time of payment is certain, though postponed to a future day; and it corrects the mistake in the preamble of the stat. 7 Geo. 1. which, after specifying particular securities, adds, "or other persons' securities;" which clearly should have been, "other personal securities." A few years after, Lee, C. J. in the case of *Swayne v. De Mattos*, 2 Strange, 1211. looked upon it as a general proposition and a settled point. These alone are strong grounds for extending it to all securities. But to consider it upon the constructions of the act itself: the preamble is certainly a special and particular; therefore without express words in the enacting part, the operation of it must be confined to the preamble. But there are a variety of cases where it has been determined that strong words in the enacting part of a statute may extend it beyond the preamble. Here then are express words in the enacting part, which are more large than the preamble; the preamble says, "the consideration must be goods sold upon trust, by merchants or traders;" the enacting part says, "all persons who shall give credit or such securities as aforesaid, upon a good and valuable consideration, *bona fide*, for every sum or sums of money, or other matters or things whatsoever." The words "such securities" are only referable to the securities before particularly mentioned, and in which the day of payment is certain, though not yet arrived; if the words were less general than they are, their meaning is fully explained by the stat. 5 Geo. 2. c. 30. § 22. and this construction of the act is confirmed by the constant practice of the commissioners.—*Postea* to the defendant.

2. DOMMET ET AL. V. BEDFORD AND WOODHAM, E. T. 1796, K. B. 6 T. R. 684; S. C. 3 Ves. 149.

This was a case from the Court of Chancery for the opinion of the judges of the K. B. and was in substance as follows:—T. B. made his will properly executed and attested; and after giving his niece A. J. one annuity, and to his nephew R. T. another annuity, he gave to his nephew Bedford Woodham an annuity of 30*l.* during his life; the first payment to be made six months after his decease, subject to this condition, "that it shall be paid into his own hands only, and on his own receipt; and that if the same be alienated, or any part thereof, the same shall immediately cease and determine." The deviser charged his real and freehold estates with the payment of these annuities, and then devised the said estate to the defendant, John Bedford and his heirs, subject to the above annuities. The deviser died in 1789, leaving John Bedford his heir at law. In 1790, Bedford Woodham, and A. D. his then co-partner in trade, were duly declared bankrupts. The plaintiffs were chosen assignees of their estate and effects; and by indenture of bargain and sale duly enrolled, the commissioners assigned to the plaintiffs, amongst other things, the said annuity of 30*l.* given by the will of K. B. to Bedford Woodham, for and during the life of Bedford Woodham, in trust to and for the several uses of the creditors of A. D. and Bedford Woodham. The plaintiffs filed

Where an annuity was devised to A. for life, pay a ble to him only and to no other, to cease immediately upon alienation held that it ceased by A.'s bankruptcy and the bargain and sale of his estate.

their bill in Chancery, against John Bedford and Bedford Woodham, praying, contingencies. *Cottrell v. Hook*. Doug. 97. See *ex parte Mitford*, 1 Bro. 398. See *ex parte Barrow*, 1 Bro. 268. as to bonds where the penalty is not forfeited. *Ex parte Barrow*, 1 Bro. 263. If a person covenanted to pay at fixed periods a sum of money by instalments, and the payments are dependant upon the contingency of the life of the covenantor, the instalments not due at the time of his bankruptcy are not proveable under the commission of bankruptcy issued against him. *Ex parte Mitford*, 1 Bro. 398. By the 49 Geo. 3. the intention of the legislature in directing the commissioners to ascertain the value of the annuity was, not that the commissioners should have the power to fix the value, but that they should decide according to the evidence with respect to the value. *Ex parte Thistlewood*, 1 Rose, 290. In general the value to be proved in the original sum given for the purchase of the annuity, with the diminution occasioned by the lapse of time since the grant. *Ex parte Whitehead*, 1 Murr. 129; and see 1 Bro. C. C. 267; 1 Atk. 251; 14 Ves. 524; *ex parte Thistlewood*, 1 Rose, 290.

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Annuity deeds being void rendering the consideration proveable under commission against the grantor, notwithstanding the deeds are not set aside till the bankrupt has obtained his certificate.* So the bankruptcy and certificate of one of several joint grantors of an annuity does not affect the liability of the other grantors.

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By an express agreement the obligee of a bond to secure an annuity may waive the forfeiture for non-payment on the day, so as to be entitled to recover against the obligor although the obligor has been discharged under an insolvent debtor's act between the time of the forfeiture and the

amongst other things, that they might be declared entitled to the said annuity during the life of Bedford Woodham. John Bedford, by his answer, stated, that the annuity was, according to the restrictions in the will, determined by the bankruptcy of Bedford Woodham, and the execution of the assignment of his effects; and the cause being heard, it was ordered, that a case should be made for the opinion of the judges of the court of K. B. whether by such bankruptcy, and bargain and sale, the annuity of 30*l.* a year ceased and determined. After the case had been argued, the following certificate was signed by all the judges, and sent to the Lord Chancellor. "We are of opinion that by the bankruptcy of Bedford Woodham, the indenture and bargain and sale of the annuity of 30*l.* a year ceased and determined.

See *Shee v. Hale*, 1807, 13 Ves. 506; *Brandon v. Robinson*, 1818, 18 Ves. 435; 8 T. R. 52; 2 East, 481; 1 Wright, 386.

3. *WALKER v. LISCARRAY*, H. T. 1807, N. P. 6 Esp. 98.

In an action for money had and received, upon the general issue and bankruptcy pleaded, it appeared that the deeds given to secure the payment of an annuity had been declared void on account of a defect in the memorial; the plaintiff brought this action to recover the purchase money; the instruments had not been set aside until after the bankrupt had obtained his certificates. Per Lord Ellenborough, C. J. The consideration money is proveable under a commission against the grantor of an annuity; since it must be considered that the annuity never existed.—Verdict for the defendant.

4. *BAXTER v. NICHOLS*, T. T. 1811, C. P. 4 Taunt. 90.

The annuity had been granted by the defendant and three others, by a joint and several deed. A levy had been made on the goods of the defendant in respect to certain arrears, by means of a judgment which had been obtained against the four. It was now moved to set aside the judgment, execution, &c. upon an affidavit of Nichols having become bankrupt and obtained his certificate, which it was supposed would have the effect of nullifying the annuity. Per Cur. The act is very defective. It makes no distinction between principal and surety; nor does it declare what shall be the consequence of the bankruptcy of one grantor with respect to others. As the statute 49 Geo. 3. c. 121. stands at present, the bankrupt and his future effects are merely discharged, and we see no reason why the plaintiff may not proceed on the joint judgment against the other three.—Rule absolute *pro tanto*.

(B) IN CASE OF INSOLVENCY.

1. *WEBSTER v. BANNISTER*, E. T. 1780, K. B. 1 Doug. 393.

This was an action of debt on a bond. Plea that the debt was contracted and due before the day mentioned in the act for the relief of insolvent debtors, &c. (16 Geo. 3. c. 38); it then stated the arrest of the defendant, his commitment and discharge under the act. The replication made proof of the condition of the bond, which was for the payment of an annuity by quarterly payments; it then set forth, that after the day in the plea mentioned, and before the exhibiting of the bill, to wit, on such a day, so much for one quarter, and so other quarterly payments on such and such other days became due; and the defendant had not paid them, or any part thereof, but the whole remained due, by reason whereof the writing obligatory became forfeited; and the debt and action accrued after the said day in the plea mentioned, and concluded with a verification. Rejoinder, that before the said day in the plea mentioned, to wit, on such a day, one quarter of the annuity became due and was not paid then nor since, whereby the bond became forfeited, and the debt, by virtue thereof, became due to the plaintiff before the said day in the plea mentioned. Sur-rejoinder, that true it is that one quarter became due before the said day mentioned in the plea, but that plaintiff afterwards, at the instance and request of the defendant, agreed to give

* Although, when the annuity is void, the creditor may prove for the consideration that is due, yet it has been determined, that if he insist upon his securities at the date of the commission, he cannot afterwards abandon them and prove the consideration. Ex parte James, 5 Ves. 708. And if the annuity be not enrolled from a fraudulent representation, that it is so secured upon lands in fee simple as not to be within the statute, it seems that the value of annuity is proveable. Ex parte Wright, 1 Rose, 308.

him a day of payment until a future day, to wit, till a day subsequent to the commence said day in the plea mentioned, which was accordingly only paid, and that at the time when the plaintiff so gave day of payment, he did, at the instance and request of the defendant, wave and relinquish any forfeiture of the bond which had accrued or might accrue to him by reason of the non-payment, according to the condition, and acquitted and discharged defendant from such forfeiture, and all and every debt due thereby. And the plaintiff further stated, that the defendant by reason of the premises was acquitted and discharged from such forfeiture and debts. Rebutter, by which (protesting that the sur-rejoinder was not sufficient in law, and protesting also that the defendant never requested the plaintiff to give him such day of payment) defendant alleged that the sum in the sur-rejoinder mentioned was not paid to the plaintiff *modo et forma*. Upon this issue was joined, and there was a verdict for the plaintiff. It was afterwards moved to arrest the judgment, on the ground that the bond being once forfeited, the debt became absolute, and could not be again made contingent by any waiver of the forfeiture on the condition of payment at a future day; at least it continued absolute till the compliance with the condition, which was not till after the insolvency, therefore the fact of the compliance with the condition, after the insolvency, was immaterial, and the plaintiff should have demurred to the replication, instead of joining issue on an immaterial fact, and that therefore there ought to be a repleader. Buller, J. observed that the rule was never to grant a repleader when the issue is found against the party tendering it.—Rule discharged. The case came before the Court several times, but the result was, that the Court determined clearly that the party might waive the forfeiture, and accept what he was equitably entitled to.

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2. *COTTERELL V. HOOKE*. H. T. 1779. K. B. 1 Doug. 97. S. P. *MARKS V. UPTON*. T. T. 1799. K. B. 7 T. R. 305.

In an action of covenant, the plaintiff declared that the defendant in consideration of 240*l.* by indenture dated 7th July, 1767, covenanted that he would pay the plaintiff an annuity of 40*l.* a year, during his life, by quarterly payments, and that 60*l.* of the annuity was then due and in arrear. This annuity was further secured by the defendant's bond. The defendant cravedoyer of the deed and bond, and pleaded, 1st. That they were both given for securing one and the same annuity, and that the defendant had since been discharged under the insolvent debtor's act of 16 Geo. 3. c. 38. 2dly. That the indenture under which the plaintiff had brought his action was dated and made, and all debts thereupon owing and accruing from the defendant to the plaintiff, were contracted and incurred before the 22d of January, 1776, the time mentioned in the act, and that therefore the plaintiff ought not to have any execution against the defendant, other than against his real estate, his money in the funds, or his money lent upon real security, according to the terms of the act; to each of these pleas the plaintiff demurred generally, and after argument, *Per Cur.* The question is, whether when there is a bond with a penalty, and also a deed of covenant, and the plaintiff makes no use of the penalty, he shall be barred of his remedy under the deed of covenant? The case of a bankrupt and an insolvent debtor is, as to this point, the same. When a man has two remedies, he may elect. If the plaintiff had made use of the penalty, the case would have been different; but as he has not, he may proceed as often as he pleases for breaches of the covenant, and therefore judgment must be given for the plaintiff.

3. *COWLEY V. RUSSELL*. T. T. 1812. C. P. 4 Taunt. 460. S. P. *MENCE V. GRAVES*. E. T. 1814. C. P. id. 854.

A rule had been obtained to show cause why the defendant should not be discharged as to the payment of an annuity, he having been arrested for arrears since he had taken the benefit of the insolvent act, 51 Geo. 3. c. 125. By the 16th section it is provided—that all creditors who shall be discharged,

* By 1 Geo. 4. c. 119. § 19. every creditor of any prisoner, for any sum payable by annuity or otherwise, at any future time or times, by virtue of any bond, covenant, or other securities, of any nature whatsoever, may be admitted a creditor, and shall be entitled to

Formerly if there was a bond and covenant to secure an annuity although the bond was forfeited before a discharge under the insolvent act, the party might have been sued for subsequent arrears before the covenant. But now the insolvent act of 61. G. 3. c. 125. discharges the grantor of an annuity, both as to his person and his property, from all future payments.*

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But it is only a personal discharge and does not conduce to exonerate his sureties, or satisfy specific securities. On an indictment on the 47 G. 3. c. 26. § 7.† it is not necessary to prove that the defendant took the exact sum laid, and the jury must consider whether the excess were really taken as a fair charge or as a device to avoid the statute.

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Where a deed and memorial specified the payment of the consideration money of an annuity as made by the grantee, who it appeared was to stand possessed of part for a third person to whom part of the consideration money belonged, it was held

by virtue of that act, for any sums of money payable by way of annuity or otherwise, shall be entitled to be admitted creditors, and receive a dividend in such manner, and upon such terms and conditions, as such creditors would have been entitled unto by the laws now in force, if such debtors had become bankrupt, and without prejudice in future to their respective securities, otherwise than as the same would have been affected by a proof made in respect thereof by the creditor under a commission of bankrupt. *Per Cur.* The principal debtor is completely discharged both as to his person and property, by the operation of the insolvent act, in the same manner as the person and property of a debtor are discharged under the bankrupt statutes.—Rule absolute. See 1 G. 4. c. 119. s. 10.

4 COWLEY v. BUSSELL. T. T. 1812. C. P. 4 Taunt. 460.

Per Cur. The words "without prejudice to their respective securities," used in the 16th section of the insolvent act, 51 Geo. 3. c. 125. and which, it has been urged, intended that the securities should have some subsequent operation, and render the principal debtor liable for the payment of the instalments of annuities becoming due after his discharge under the act means, that if a man has any specific security upon land, it should not be taken from him if he has sureties, that they should not be discharged; that the person and property of the debtor only are discharged.*

XI. INDICTMENT FOR TAKING EXCESSIVE BROKERAGE.

THE KING v. GILLHAM. E. T. 1795. K. B. 6 T. R. 265.

Upon an indictment on the 7th section of 17th Geo. 3. c. 26. it was objected that the evidence did not sustain the indictment, the charge being thus:—322l. 10s. was paid for brokerage;—and the evidence in support of the charge proved that the defendant, at the time of the money being paid, said that 100l. was for the writings, 100l. by way of present, and 5l. per cent. on the whole sum, viz. 122l. The judge before whom the cause was tried over-ruled the objection, and left it to the jury to consider, whether the transaction were not a mere device and colour to receive the sum stated under different pretences, and in truth for the brokerage and soliciting of the loan in fraud of the act of parliament? The direction was confirmed by the Court, who were of opinion, that the material question was, whether more than 10s. in the 100l. was taken by the defendant or not; and that it was not necessary to prove that he took the exact sum laid in the indictment, though it was not laid with a *scilicet*. See 1 Esp. N. P. 285; 1 Ld. Raym. 149; 16 East. 416; *Precedents, Petersdorff Index, Crim. Div. 5.*

XII. STAMP DUTIES.

COOK v. JONES, REEVE, AND BENWELL. H. T. 1812. K. B. 15 East. 237.

The deed and memorial in this case stated the consideration money to have received the dividend of the estate of the prisoner, in such manner and upon such terms and conditions as such creditor would have been entitled unto by the laws now in force if prisoner had become a bankrupt; the amount upon which such dividend shall be calculated, and the terms and conditions upon which the same shall be received, being first settled by the Court, without prejudice in future to their respective securities, otherwise than as the same would have been affected by a proof made in respect thereof by a creditor under commission of bankrupt, by a certificate obtained by a bankrupt under such commission. Act, sect. 10.

* And from the case of *Inglis v. McDoyall*, 1 Moore, 196. it appears that nothing less than actual payment can discharge a surety from his liability.

† The 53 Geo. 3. c. § 9. enacts that all and every solicitors and solicitor, scriveners and scrivener, brokers and broker, and other persons and person, who, from and after the passing of this act, shall ask, demand, accept, or receive, directly or indirectly, any sum or sums of money, or any other kind of gratuity or reward, for the soliciting or procuring the loan, and for the brokerage of money that shall be actually and bona fide advanced and paid, as and for the price or consideration of any such annuity or rent charge, over and above the sum of 10s. for every 100l. or actually and bona fide advanced and paid, shall be deemed and adjudged guilty of a misdemeanor, and being lawfully convicted of such offence in any court of assize, oyer, and terminer, or general gaol delivery, shall and may for every such offence be punished by fine and imprisonment, or one of them, at the discretion of the Court; and that the person or persons who shall have paid or given any sum or sums of money, gratuity or reward, shall be deemed a competent witness or witnesses to prove the same. See 17 Geo. 3. § 6.

been paid by the grantee, part of which it appeared belonged to one K. C. no objection that The plaintiff was to stand possessed of the said annuity on behalf of himself and K. C. in proportion to the respective claims of each. It was contended, they were stamped as that this deed and memorial comprised in substance two specific annuities, and for a single therefore required two stamps. *Per Cur.* It might as well be objected to an annuity. bill of exchange on behalf of two, that it was invalid, having only one stamp. The present annuity, being stamped and memorialized as a single annuity, is sufficient.

Answer in Chancery. See tit. *Chancery; Evidence; Perjury.*

Ante Utem motam. See tit. *Evidencce.*

Apothecary. See also tit. *Physician; Surgeon.*

1. **THE COLLEGE OF PHYSICIANS v. ROSE,** M. T. 1762-3, 6 Mod. 44; S. C. 16 Vinor. 341; 3 Salk. 17. S. C.

In case for practising physic within seven miles of London without licence, a special verdict was found, viz: "That the defendant being an apothecary by trade, was sent to one J. S. then sick of a certain disease; and that having seen and been informed of the said distemper, he did, without prescription or advice of a physician, and without any fee, compound and send said J. S. several parcels of medicines as proper for the distemper under which he was labouring, only taking the price of his drugs for the same;" whether this was such a practising of physic as was prohibited by the 14th and 18th Hen. 3. c. 15. was the question before the Court. *Per Cur.* The practising of physic within this statute consists, 1st. In judging of the disease and its nature, constitution of the patient, and many other circumstances. 2dly. In judging of the fittest and properest remedy for the disease; and 3dly. In directing or ordering the application of the remedy to the diseased person; and that the proper business of an apothecary is to make and compound, or prepare, the prescription of the doctor, pursuant to his directions. 4thly. The defendant taking on himself to send physic to a patient as proper for his distemper, has plainly taken upon himself to judge of the disease and fitness of the remedy; he has, therefore, acted in the executive or directing part.—Judgment for the plaintiffs. See 2 Salk. 451; 4 Mod. 47; Com. 79; Rastall, 463. b. pl. 4; Rob. Ent. 414; Rast Ent. 81; 2 Camp. 144.

The business of an apothecary is to prepare the prescription of the physician pursuant to his directions.

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2. **STONEHOUSE v. BODVIL,** H. T. 1661, K. B. T. Raym. 67.

After verdict for plaintiff in an action of assumpsit for medicine provided and delivered "for the daughter of the defendant, at his request." A motion was made in arrest of judgment, because it appeared on the face of the declaration to be a collateral promise, and not an original undertaking, and that the plaintiff ought to have declared specially; but *Per Cur.* Physic provided and delivered for, not to, the daughter of the defendant, is sufficient; for after verdict it must be intended to have been delivered to the defendant for the daughter. See precedents, Lil. Ent. 24; 3 Morg. Pr. 8; Mod. Ent. 89, 91; Pl. Ass. 44. 64; 2 Went. 492; 3 id. 58; 2 Chit. Pl. 76-77.

Stating in a declaration by an apothecary that the medicines were delivered for the defendant, and not to defendant, is good after verdict; Or a *quantum meruit* it to pay what the plaintiff might deserve, without averring he had cured the patient, if that fact can be collected from the whole declaration.

3. **LEE v. EDWARDS,** M. T. 1668, K. B. 1 Lev. 280; S. C. 1 Sid. 428; S. C. 1 Vent. 44.

In assumpsit, the first count in the declaration stated, in consideration that the plaintiff would provide medicines, and would use his endeavours to cure J. S. the defendant promised to pay him such a sum as he might deserve; and it averred that he found medicines and employed his endeavours, and that his services were worth 10*l.* 2nd count—"That in consideration that the plaintiff had provided medicines, and employed his labour and pains, and cured J. S. After verdict for the plaintiff, a motion was made in arrest of judgment, on the ground that it was not averred in the first count that he had cured J. S. That he would cure J. S. is part of the consideration, and that the damages being entire the plaintiff could not have judgment. But *Per Cur.* It is quite clear, from the whole declaration, that J. S. is cured. After verdict we must intend that what is alleged in the different counts refer to the same person, and to the malady and cure stated in the first.—Judgment for plaintiff.

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4. TUTTY V. FLEWIN, E. T. 1709, K. B. 11 Mod. 231.

In an action for words by an apothecary, the words charged in the declaration were—"It is a work of blood he has to answer for in this town; through his ignorance he killed a woman and two children of S—."

Per Cur. These words are actionable. See Cro. Eliz. 620; 2 And 268; 2 Roll. Rep. 344; Cro. Jac. 206; Ketley, 69; 1 Cro. 370; Sir J. Jones, 141; Godb. 341; 1 Vent. 21; 2 Keb. 489; 2 Ld. Raym. 1480; Stra. 760; Cowp. 275.

5. WOGAN V. SOMERVILLE, E. T. 1817, C. P. 7 Taunt. 401; S. C. 1 Moore, 102.

It was contended that the plaintiff, who styled himself an apothecary, was not entitled to recover in this action. It appeared that the plaintiff had acted as house apothecary to an infirmary for more than three years previous to the passing of the 55 Geo. 3. c. 194. It was, however, objected that this did not support the allegation that he was an apothecary; and that he ought to have been nonsuited, having produced no certificate, nor was it shown that he had served an apprenticeship of five years. *Per Cur.* The plaintiff is within the excepting clause of the statute. He must be therefore viewed to all intents and purposes as an apothecary.

6. THE APOTHECARY'S COMPANY V. WARBURTON, M. T. 1809, K. B. 3 B. & A. 40.

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or not.

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By the 55 Geo. 3, c. 194, s. 20, it is enacted, "that if any person (except such as be then actually practising as such) shall after the first of August 1815, act or practice as an apothecary in any part of England or Wales, without having obtained a certificate as therein described, every person so offending shall for every such offence forfeit the sum of 20*l*." The defendant in this case was sued for the penalty; and it was contended that he was within the exception. It was proved that the defendant had attended many persons afflicted with different complaints, and administered medicines to them, previous to the first of August, but it was also proved that he was totally ignorant, and incapable of making up a physician's prescription, before that period. In summing up to the jury the judge referred to the fifth section of the act as describing the duty of an apothecary to be to make up the prescriptions of physicians, and said, that it appearing that up to the first of August, 1815, the defendant never had, or could have done so, they ought to examine that section when deciding whether the defendant actually and *bona fide* practised as an apothecary so as to bring him within the exception. A verdict had been found for the plaintiffs. A rule nisi was now obtained for a new trial on the ground of a misdirection by the judge. *Per Cur.* The direction of the judge cannot be impugned. The defendant was clearly liable to the penalty unless he was protected by the clause contained in the fifth section. To decide the question whether the present defendant was or was not so, a reference was properly made to that section to ascertain what was the meaning of the words "practise as an apothecary." At one time the duties of apothecaries was to make up the prescriptions of physicians; of late they have also been in the habit of attending patients, and administering medicine upon their own judgment. The former is, however, the most important of the apothecary's duty; and it appears that prior to the 1st of August, 1815, the defendant was totally incapable of doing so; as he could not read latin, which is the language in which prescriptions are generally written; and even if the prescription had been in English, he was ignorant of the relative proportions of weights or measures. Here is, therefore, a total inability as to one part of an apothecary's duty, which has been considered by the legislature as the most important. The defendant being, therefore, at the time required by the act, incapable of practising to the full extent of the duties of an apothecary, he cannot be considered as having *bona fide* practised as such. If the only objection to the defendant being within the exception were defective skill, still he might have been held to be within the protection of the act. As the case stands, the rule must be discharged, as the defendant has not proved, as he easily might have done if the fact had been so, that he ever did or could perform both these parts of his duty.—Rule discharged. See 7 Taunt. 401; 1 Moore, 102.

7. THE COMPANY OF APOTHECARIES v. ROBY. T. T. 1822. K. B. 5 B. & A. 949; S. C. 1 D. & R. 764.

The question in the present case was, whether the defendant had incurred the penalties inflicted by the 55 Geo. 3. which received the royal assent July 12, 1815, on apothecaries practising without a certificate. The defendant contended that he was exempt, being within the accepting clause of the statute, which provides "that nothing contained in the act shall extend, or be construed to extend, to any person or persons practising as an apothecary previously to the 1st of August, 1815." To prove the fact of his not being liable to the payment of the penalty, the defendant gave in evidence that previous to the 24th of July in that year he had compounded medicines, and sold them to different patients whom he attended, but there was no proof that he kept any shop, or openly exposed drugs for sale. The jury had found a verdict for the plaintiff, having been told by the judge that the evidence adduced did not prove that the defendant had been practising as an apothecary at all, and that even allowing that he had, it was necessary to show that the party claiming the exemption had practised as an apothecary on the 1st of August. A rule nisi had been obtained to set it aside on account of the judge's misdirection. *Per Cur.* There are five sections in which the time fixed upon by the act as to apothecaries practising, so as to exempt them from the penalties incurred by the statute, is specified: the 14th, 17th, 30th, 21st, and 29th. The words and expressions made use of in the 17th and 20th sections are clear and evident; the exception being stated to be "except such as were then actually practising as such." So the 21st section, which enacts "that no apothecary shall be allowed to recover and charge," &c. unless proof be adduced that he was in practice as an apothecary prior to, or on the first day of August, 1815. For although it is manifest the words prior to may create a doubt, yet we think the ambiguity is sufficiently explained by the other sections. The word "or" should perhaps be even rendered, "and." The only difficulty that can be entertained, or obstacle that can impede unhesitating decision as to the construction of the act as applicable to the question before us, exist in the terms used in the 14th and 29th sections. By the former it is enacted "that from and after the 1st day of August, 1815, it shall not be lawful for any person or persons (except persons already in practice as such) to practise as an apothecary, unless," &c. Now the word already might be supposed to relate either to the 1st of August, or the 12th of July. But arguing from the manifest import of the other sections it seems to us that it is used to denote the former, unless it was the intention of the legislature that no apothecary should be exempt from the penalty who was not actually in practice both on the 12th of July, and on the 1st of August. The 29th section enacts "that this act shall not lessen, &c. the rights, &c. vested in and exercised by either of the two universities, &c. other and except such as shall have been altered, varied, or amended, in and by this act, or of any person or persons practising as an apothecary previously to the 1st of August, 1815." Now if the words previously to are to be understood in their large and unqualified sense, this clause is completely irreconcilable even with the 14th section. But it is impossible to suppose that the exemption was meant to extend to persons who had been in practice at any remote period of their life. The mode in which the judge in his address to the jury construed the act is therefore correct, as the 29th clause contains only a saving of the rights of those who were in practice previous to the 1st of August; except as altered or varied by the modifications to be found in the 20th section. Which imposes the penalties on persons not in practice on the 1st of August. The present case does not require us directly to decide whether persons claiming exemption must have been in practice both before and after the 1st of August. The present rule must be therefore discharged. Rule discharged.

8. THE COMPANY OF APOTHECARIES v. ROBY. 1 D. & R. 564; S. C. not S. P. 5 B. & A. 949.

The Court in this case intimated a doubt whether a person under the age of 21 could be entitled to practise as an apothecary, the law presuming want

The 55 G. 3. declared that from and after the 1st day of August, 1815, no one should practise as an apothecary except under certain regulations "except such as were then actually practising as such," & the act received the royal assent on the 12th of July, 1815; held that to bring a party within the exception, it was necessary to show that he was so practising on the former day. 720]

Qu. Whether an infant can lawfully practise as an apothecary without reference to the stat. 55 G. 3. c. 194.

A certificate issued by the Court of Examiners is conclusive of the apprenticeship of an apothecary required by the provision in the 55 G. 3. c. 194. § 14. [721]

A counter plea to deprive an appellee of his right of wager of battle must disclose such violent and strong presumptions of guilt as admit of no contradiction.

of skill in an infant, independent of the statute 55 Geo. 3. c. 194. See 5 B. & A. 81; Cro. Car. 55; Co. Lit. 172, a; Com. Dig. tit. Infant, c. 1.

9. SHERWIN V. SMITH. E. T. 1823. C. P. 1 Bing. 204.

This was an action to recover the amount of an apothecary's bill. The plaintiff proved a certificate from the society of apothecaries as required by the 55 Geo. 3. c. 194. but did not prove that he had served an apprenticeship, which it was contended was necessary. *Per Cur.* Considering the words of the 14th section "that no person shall be admitted to any such examination unless he shall have served an apprenticeship," we think the certificate conclusive of the apprenticeship.

Apparel, Injuries to. See tit. *Assault and Battery.*

Appeal. Of Felony.*

ASHFORD V. THORNTON. M. T. 1818. K. B. 1 B. & A. 405.

William Ashford, the eldest brother and heir-at-law of Mary Ashford, spinster, deceased, brought a writ of appeal against Abraham Thornton, for the murder of his said sister; of which offence the defendant had been tried

* Appeals of this description having been abolished by a recent statute, it has been thought unnecessary to introduce an abridgment of the cases on the subject. The following note contains a succinct statement of the general rules; and a reference to the principal authorities will be subjoined.

An appeal, when spoken of as a criminal prosecution, denotes an accusation by a private subject against another, for some heinous crime, demanding punishment on account of the particular injury, rather than for the offence against the public.

But though appeals were thus in the nature of prosecutions for some atrocious injury committed more immediately against an individual yet it also was anciently permitted that any subject might appeal another subject of high treason, either in the courts of common law (Brette, 22.) or in parliament, or (for treasons committed beyond the seas) in the court of the high constable and marshal. So late as 1631, there was a trial by battle awarded in the Court of Chivalry on such an appeal of treason (Rushw. vol. 2. part 2. p. 112). They were, however, abolished by the statutes 5 Ed. 3. c. 9; 25 Edw. 4. c. 24; and 1 H. 4. c. 14 (1 H. P. C. 349): so that the only appeals afterwards in force for things done within the realm, are appeals of felony and mayhem.

An appeal of felony might have been brought for crimes committed either against the parties themselves, or their relations. The crimes against the parties themselves were larceny, rape, and arson. The only crime against one's relation, for which an appeal could be brought was that of killing him, by either murder or manslaughter. But this could not be instituted by every relation, but only by the wife for the death of her husband, or by the heir male for the death of his ancestor; which heirship was always confirmed by an ordinance of King Henry I. to the four nearest degrees of blood (Mirr. c. 2. s. 7). The heir, as was said, must also have been heir male, and such a one as was the next heir, by the course of the common law, at the time of the killing of the ancestor. And by the statute of Gloucester. 6 Ed. 1. c. 9. all appeals of death were to be sued within a year and a day after the completion of the felony by the death of the party.

These appeals might have been brought previous to any indictment, and if the appellee was acquitted thereon, he could not afterwards be indicted for the same offence.

If the appellant was acquitted, the appellant (by virtue of the statute of Westminster, 2. 13 Ed. 1. c. 12.) suffered one year's imprisonment, and paid a fine to the king, besides restitution of damages to the party for the imprisonment and infamy which he had sustained; and if the appellant was incapable of making restitution, his abettors were obliged to do it for him, and were also liable to imprisonment.

If the appellee were found guilty, he suffered the same judgment as if he had been convicted by indictment, with this difference, that on an indictment the king might pardon and remit the execution, on an appeal; which is at the suit of a private subject; to make an atonement for the private wrong, the king could no more pardon it than he could remit the damages recovered in an action of battery (2 Hawk. P. C. 392). But by the express provisions of stat. 4 & 5 W. & M. c. 8. an accomplice convicting two others guilty of robbery, shall have the king's pardon, which shall be a good bar to an appeal of robbery; as the punishment of the offender, in all cases, might have been remitted and discharged by the concurrence of all persons interested in the appeal. 1 Hale, 9.

The case of Ashford v. Thornton was the last case of an appeal of murder, and gave occasion to the statute 59 Geo. 3. c. 46. which has completely abolished this mode of prosecution, entitled "An Act to abolish Appeals of Murder, Treason, Felony, or other Offences, and Wager of Battle or joining Issue, and Trial by Battle, in Writs of Right," passed 22d of June, 1819, which, after reciting, "Whereas appeal of murder, treason, felony, and other offences, and the manner of proceeding therein, have been found to be oppressive; and the trial by battle in any suit, is a mode of trial not fit to be used; and it is expedient that the same should be wholly abolished," enacts, "that from and after the passing of this act, all appeals of treason, murder, felony, or other offences, shall cease, de-

and acquitted at Warwick Summer Assizes preceding, under circumstances of strong suspicion (though not entirely conclusive) of his having ravished, and afterwards thrown her into a pit of water, where the body was found. The appellee, upon being called upon to plead, pleaded "Not guilty, and I am ready to defend the same by my body;" and thereupon taking his glove off, he threw it upon the floor of the court. The appellant afterwards delivered in a counter-plea, stating strong circumstances of suspicion, to which there was a replication, a general demurrer, and joinder therein. After very long and elaborate arguments (filling 56 pages in the report of them), the Court of K. B. held that the appellee had a right to wage his battle, the appellant not having brought himself within any of the established cases which entitle him to decline the wager of battle, "where the appellant is an infant, or a woman, or above 60 years of age; or where the appellee is taken within the mainour, or has broken prison, or where great and violent presumptions of guilt exist against the appellee, which admits of no denial, or proof to the contrary." The appellee was afterwards discharged *sine die*, the appellant not praying further judgment. See 6 E. 3, 9; 12 id. 2 2 Sid. 4; 3 H. 7, c. 1; 1 Glanv. 14, c. 1; Britton, c. 22, p. 40; Horne's Mirror, p. 158. A. D. 807; Stannford, P. C. b. 3, c. 13, p. 176-8; Fitz. Abr. tit. Corone, pl. 411; Co. Litt. 2946; 2 Inst. 240; Hawk. P. C. lib. 2, c. 45-7; Bl. Com. vol. 3, 446; Dufvene's Glossary, p. 187; Montesquieu's Esprit de Loi lib. 28, c. 25; Robertson's History of Charles V. vol. 1. p. 275; River's History of English Law, vol. 2, p. 25; Henry's History of Great Britain, vol. 1. p. 332; Bro. Abr. tit. Battaile, pl. 3; 1 State Trials, 11.

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Appeal to Sessions. See tit. Colonies, Convictions, Error, Excise, Game, Highway, Inclosure, Mandamus, Overseers of the Poor, Poor Rate, Prohibition, Removals, (Orders of,) Sessions, Taxes.

termine, and become void; and that it shall not be lawful for any person or persons, at any time after the passing of this act, to commence, take, sue an appeal of treason, murder, felony, or other offence, against any other person or persons whomsoever; but that all such appeals shall from henceforth be utterly abolished, any law, statute, or usage to the contrary in any wise notwithstanding."

See generally on this subject, 2 St. Pl. C. 581; H. P. C. 182; 2 Inst. 320; 2 Vin. Ab. 528; 1 Com. Dig. tit. Appeals.

The following is a chronological table of the principal cases decided on the subject of appeals of felony, during the period allotted to this abridgment:

Polifexen v Polifexen	E. T.	1670	K. B. 2 Liv. 6; s. c. 1 Vent. 133.
Warren v Verdon	T. T.	1681	Skin. 48; s. c. T. Jones, 210.
Siddons v Johnson	" "	1683	2 Shower, 375.
Goring v Deering	H. T.	1686	3 Mod. 136.
Hoyle v Pitt	M. T.	1691	4 Mod. 158; s. c. 3 Salk. 38.
Lowden v Scerodens	E. T.		12 Mod. 20; s. c. 4 Mod. 99.
Bennet v Preston	M. T.		4 Mod. 150.
Sutton v Sparrow	" "	1693	12 Mod. 65.
Prince v Bawd			3 Salk. 38.
Bansom v Offley			id. 39.
Armstrong v Lisle	H. T.	1695	1 Salk. 61; 12 Mod. 109; Carth. 394; Skin. 670; Holt. 62; Com. 410.
Reynolds v Kening	H. T.	1694	Skin. 634.
Armstrong v Lisle		1695	1 Salk. 61.
Wilson v Law	T. T.		4 Mod. 290; s. c. 3 Salk. 380; 1 Salk. 59; 2 id. 589; Comb. 293; Carth. 331; Skin. 443, 549, 551; Holt. 62; 1 Lord Raym. 20.
Anon.	T. T.	1700	12 Mod. 554.
Wilmott v Tyler	E. T.		12 Mod. 488; 1 Salk. 68; 1 Ld. Raym. 67.
Colt v Smith	H. T.		12 Mod. 642.
Culliford's case	M. T.	1703	6 Mod. 219, 3 Salk. 85; 1 Salk. 382; Lord Raym. 434.
Anon	H. T.	1704	12 Mod. 70.
Young v Slaughterford	E. T.	1706	12 Mod. 217.
Smith v Bowen		1708	11 Mod. 216; 2 Ld. Raym. 1288; Holt. 355.
S. C.	S. C.	T. T.	1708 11 Mod. 230; 2 Ld. Raym. 1288; Holt. 353; 11 Ra. Ent. 586; 11 Mod. 216.
Young v Slaughterford		1798 9	11 Mod. 288.

- **Appearance, Common.*** See tit. Attorney; Bail, Common; Baron and Feme; Corporation; Debt; Infants; Lunatics; Original, Proceedings by.

(A) BY THE DEFENDANT,† AND EFFECT THEREOF, p. 723.

(B) ——— PLAINTIFF, ACCORDING TO THE STATUTE, p. 725.

(C) OF UNDERTAKING TO APPEAR, AND EFFECTS THEREOF, p. 727.

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(A) BY THE DEFENDANT, AND EFFECT THEREOF.

A common appearance by defendant cures all defects in mesne process. 1. WILSON v. FINCH, H. T. 1743, C. P. Barnes, 163. WADE v. WADMAN. H. T. 1751, C. P. Barnes, 167. LANGLEY v. THE BAILIFFS OF EAST REDFORD, H. T. 1741, C. P. Barnes, 415. LLOYD v. WILLIAMS, M. T. 1790, C. P. 3 Wils. 141. FOX v. MONEY, E. T. 1798, C. P. 1 B. & P. 250. DOWNES v. WITHERINGTON, H. T. 1810, C. P. 2 Taunt. 243.

Per Cur. An appearance cures all errors and defects in process. See 1 Stra. 155; 3 T. R. 611; 1 B. & P. 344.

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As where an attorney sued, an administrator is proceeded against by bill. 2. WADE v. WADMAN, H. T. 1751, C. P. Barnes, 167. The defendant, an administrator, an attorney of the Common Pleas, was sued by bill in an action against him as administrator, and it was held to be no objection after appearance.

3. HOLE v. FINCH, H. T. 1769, C. P. 2 Wils. 393. After a defendant has appeared and is in court, there is an end of the mesne process, and therefore if after being sued by a wrong christian name, he appears by his right name, and the plaintiff declares against him in his right name, the Court will not interfere to set aside the proceedings for irregularity. See post, tit. Misnomer; and 1 B. & P. 645; 2 id. 109; 3 T. R. 611; 3 Wils. 49; 4 Taunt. 713; Willes. 462; 1 Tid. 7th edit.

4. FOX AND ANOTHER v. MONEY, WIDOW, E. T. 1798, C. P. 1 B. & P. 250. A rule which had been obtained before the appearance of the defendant to set aside the proceedings for an irregularity in the writ was made absolute, the Court being of opinion that the defendant was bound to object in the first instance.

5. WILLIAMS v. STRAHAN, T. T. 1805, C. P. 1 N. R. 309. *Per Cur.* If a defendant accept a declaration, and act as if an appearance has been entered for him, his conduct is an undertaking to appear, and he cannot be afterwards allowed to take advantage for alleged irregularity on the appearance not having been entered.

6. BUCKLER v. RAWLINS, H. T. 1802, C. P. 3 B. & P. 111. *Per Cur.* It is the uniform and regular practice where agents are employed, for them to enter an appearance in their own names, and afterwards to deliver a plea in the name of their principal.

(B) BY THE PLAINTIFF, ACCORDING TO THE STATUTE.‡

1. MORSE, AN ATTORNEY, v. FARNHAM, T. T. 1792, C. P. Prac. Reg. 32. JONES v. MERRIDEN, T. T. 1728, C. P. Ca. Prac. 47; S. C. Prac. Reg.

[725] 32. S. P. CANTER v. JOCKHAM, H. T. 1731, C. P. Prac. Reg. 31.

Attachment of privilege returnable on Friday next after the morrow of the 18 G. 1. c. Holy Trinity, being the 25th of May, the plaintiff entered an appearance for

29. an appearance cannot be entered by the plaintiff till the ninth day after the return of the writ, the defendant having all the eighth to enter it. * An act or proceeding in the Common Pleas of the same meaning and effect, or common bail in the King's Bench, that is a first act of a defendant in defending a suit or action notailable, commenced against him. At common law the defendant must have in general appeared in person, and could not have appeared by attorney without the king's special warrant, by writ or letters patent. Co. Lit. 128. a; 2 Inst. 249. 378; F. N. B. 25; 1 Mod. 244. But now by the stat. Westm. 2. (13 Edw. 1.) c. 10. a general liberty is given to the parties of appearing by attorney. Gilb. R. P. 323; 2 Inst. 376; F. N. B. 25.

† Where the defendant is served with a copy of the process, he must cause a common appearance to be entered on the return day of the process, or within eight days of such return. The eight days are reckoned from the return day, and not from the *quarto die post* of the return of the writ, and the appearance is entered with the filacer of the county to which the writ is directed, upon a precept or note of appearance being made out and delivered to him on unstamped paper, which he enters in a book kept for that purpose.

‡ Before the stat. 1. Geo. 1. c. 29. common bail could only have been filed, or a common appearance entered, by the defendant or his attorney. But now by that act, as altered by the 5 Geo. 2. c. 27. "If the defendant having been served with process shall not appear

the defendant on the first of June, being the eighth day, and left a declaration in the office, and gave notice of it with a rule to plead, and for want of a plea signed judgment. On motion that the judgment might be set aside, because the appearance was entered on the 8th day, when it should not have been entered until the ninth. The Court said the appearance being entered by the plaintiff for the defendant on the eighth day was wrong; it should have been on the ninth, but the application to the Court being after judgment, it was too late. See 1 Tidd. 267. 7th edit.; Imp. C. P. 216. 217.

2. BOSANQUET AND OTHERS v. RUNDO. H. T. 1733. Ca. Prac. Reg. 33. The writ was returnable Octab. Hil.: a declaration was left in the office, notice thereof, and a rule to plead was given on the 23d of January. The rule to plead expired on the 26th of January; on the 28th of that month the plaintiff entered an appearance for the defendant, and in the afternoon signed judgment. *Per Cur.* The defendant had eight days to appear in, exclusive of the return day, and therefore the plaintiff could not sign judgment until the 29th; the judgment must be set aside.

3. WESTALL v. FINCH. T. T. 1754. C. P. Barnes. 406. S. P. GREENSLADE v. ROTHEROE. H. T. 1806. C. P. 2 N. R. 132. SYMMERS v. MASON. M. T. 1797. C. P. 1 B. & P. 105.

Defendant moved to stay the proceedings, the process not having been served upon him, but upon another person, and obtained a rule to show cause. Upon showing cause it was insisted by the plaintiff that although the process might be served upon a wrong person, yet an appearance being now entered the defendant was in court, and the mistake was aided, but, *Per Cur.* The appearance is entered by plaintiff according to the statute; this act by no means corrects the mistake. Let the rule be absolute. See 3 T. R. 611; 10 East. 328; 11 East. 225; M. & S. 450.

4. WHESTON v. PACKMAN. H. T. 1770. C. P. 3 Wils. 49.

The defendant was rightly named John both in a writ of *capias ad respondendum* and in the declaration delivered, the defendant not entering his appearance in due time; plaintiff's attorney made an affidavit of the service of the writ on the defendant by his right name, and entered an appearance for him according to the statute by the name of James instead of John. A motion was made to set aside the declaration because the defendant was not in Court.

Per Cur. (Chief Justice Wilmot and Gould J. only present.) This is a mere slip, and the affidavit is right; so let the filacer alter the entry of the appearance, and insert the name of John instead of James.

5. JONES v. WILKINSON. E. T. 1734. C. P. Ca. Prac. 116. S. P. MAURICE v. BARRY. M. T. 1728. C. P. Prac. Reg. 29.

On motion to set aside an interlocutory judgment, on the defendants attorney's affidavit, stating he was not called on for a plea. On a rule to show cause it appeared, that the defendant's appearance had been entered by the plaintiff pursuant to the statute, and that notice of a declaration being filed, had been delivered to the defendant. *Per Cur.* In this case the plaintiff is not obliged to take notice of any attorney that afterwards appears to be concerned, unless he may file or deliver a plea.

6. MATTHEWS v. STONE. T. T. 1733. C. P. BARNES. 242. S. P. ANON. M. T. 1727. C. P. Prac. Reg. 146. ANDERTON v. MORETON. H. T. 1726. C. P. Prac. Reg. 145.

The writ was returnable in Hilary term, and a declaration of the same term was left in the office, and afterwards an appearance was entered by plaintiff at the return thereof, or within eight days after such return, the plaintiff upon affidavit of the service of such process made before a judge or commissioner of the court for taking affidavits, or before the proper officer for entering common appearances; or his deputy (and which affidavit shall be filed gratis) may enter a common appearance, or file common bail for the defendant, and proceed thereon as if such defendant had entered his appearance or filed common bail." The affidavit required by these statutes cannot in the King's Bench be taken before a commissioner who is concerned as attorney for the plaintiff, but in the Common Pleas it is otherwise. R. E. 13 Geo. 2. C. P. No memorandum or warrant to defend is necessary to be filed by the plaintiff in this case.

If it be entered before the return of the writ, it may be objected to after judgment. If the defendant be sued by a wrong name plaintiff cannot enter an appearance in his right name. [726] But if the writ and declaration be against the defendant in his right name an appearance entered for him by plaintiff according to stat. in a wrong name, may be amended. When plaintiff enters an appearance he is not obliged to notice any attorney employed by defendant, unless such attorney deliver or file a plea. The plaintiff must appear according to the statute before the declaration is filed in chief:

But where an appearance was by plaintiff before the regular time for defendant's appearance and notice of declaration had been served, an application after judgment signed, to set the same aside for irregularity was held too late.

tiff according to the statute, but no notice of the declaration was given till the 12th of April, for defendant to plead within the first four days of Trinity term. A motion was made to set aside the judgment, the declaration having been left in the office before the appearance entered, and a rule nisi was granted. Afterwards cause was shown, and Court discharged the rule, the declaration being a declaration well delivered only from the time of the notice; but the Court made another rule to set aside the judgment, upon payment of costs, pleading an issuable plea, and taking short notice of trial.

7. MORSE V. FARNHAM. T. T. 1752. C. P. Barnes. 242.

An attachment of privilege was returnable on Friday next after the morrow of the Holy Trinity, with notice for the defendant to appear on the 25th of May. Appearance was entered by plaintiff on the 1st of June, and judgment afterwards signed. Defendant moved to set aside the judgment, the appearance being entered by plaintiff one day, if not two days, before the time for defendant's appearing was expired, and a rule nisi was granted. And the appearance was holden to be irregularly entered; but on its being shown that defendant had subsequently received notice of the declaration having been left in the office, it was held that he should have applied before judgment, and was too late after judgment; and therefore the rule was discharged.

8. NORTH AND ANOTHER V. LAMBERT. T. T. 1800. C. P. B. & P. 2402.

Per Cur. Where the defendant does not appear, and the plaintiff enters no demand an appearance for him under the statute, the plaintiff has a right to sign judgment without demanding a plea. See Barnes. 1 B. & P. 341; 1 Wils. 134; necessary 8 T. R. 465.

(C) OF UNDERTAKING TO APPEAR, AND EFFECTS THEREOF

1. LORYMER V. HOLLESTER. E. T. 1725. K. B. 1 Stra. 693. S. P. PARSON V. WHITLEY. H. T. 1791. C. P. Prac. Reg. 26.

A bailiff who had a writ against the defendant came to S. an attorney, and told him the defendant desired he would back the writ, and appear for him; and afterwards, upon the plaintiff's attorney applying to him, he said he had sent orders to his agent to appear, and he believed he had done it. Whereupon the plaintiff's attorney delivered a declaration, and signed judgment for an attorney want of a plea. Upon a motion to set it aside it appeared the bailiff went of his own accord to S. without the directions of the defendant, and that S. discovering this, had countermanded the orders for appearing, and that in fact there was no appearance. But the Court refused to set it aside, and said they would oblige S. to file common bail according to his undertaking, in order to make the proceedings regular, there being no fault on the part of the plaintiff's attorney.

2. THEEDAM V. JACKSON. 1732. C. P. Prac. Reg. 26. HOLIDAY V. SCOT. M. T. 1731. C. P. Ca. Prac. C. P. 65. S. P.

An attorney had undertaken to appear for the defendant, which was evidenced by the following memorandum: "I appear for the defendant, and demand oyer of the bond," &c.—but he afterwards refused to pay for the copies. The plaintiff signed judgment. *Per Cur.* The defendant's attorney having undertaken to appear, his having omitted to fulfil his engagement ought not to be allowed to prejudice the defendant, and we would have compelled him to appear, in pursuance of his undertaking.

3. ANON. T. T. 1813. K. B. 2 Chit. Rep. 36.

A rule was granted to show cause why an appearance should not be entered by defendant's attorney, in conformity with a verbal undertaking by him to do so. See Tidd. 7th. ed. 266. n. citing R. M. 1654. § 10. K. B.; R. M. 1654. § 13. C. P.; Lofft. 192-3; semb. contra, 1 Sell. 493.

4. ANON. E. T. 1772. K. B. Lofft. 192.

An attorney undertook to enter a common appearance; but though he wrote the undertaking, he did not sign it, and immediately retracted. An

* And *semb.* accepting a declaration is an undertaking to appear. 1 Sel. 493.

application was made for an attachment, but the Court discharged the rule, thinking the undertaking not so complete as to render it irrevocable

undertaking, but did not

sign, and immediately retracted, but the Court refused

to interfere

5. ANON. H. T. 1819. K. B. 1 Chit. Rep. 129.

An error had been committed with reference to a writ of *latitat*, it having been served on the 25th of January, but not tested until the 30th, on which day it was returnable. The defendant, previously to discovering the mistake, informed the plaintiff that he would appear, receive a declaration, and give security for costs. A motion was now made to set aside the writ, but the Court refused to grant a rule on the ground that the irregularity was aided.—Rule refused.

Irregularity in process is cured by undertaking to appear, &c. although the defendant is not aware at the time of the mistake. An attorney is not obliged to put in bail who merely undertakes to appear to process.

6. ANON. E. T. 1815. K. B. 2 Chit. Rep. 415.

Per Cur. An undertaking given by an attorney in general terms, "to appear to any process," applies simply to an appearance in the cause, and not to putting in special bail. The rule which has been obtained, calling on the defendants, as attorneys, to put in bail, must be therefore discharged with cost. See 4 East. 229; 1 T. R. 422; as to an undertaking to put in special bail; and post, tit. Bail.

Appendant. See tit. *Common; Manor; 3 Vin. Ab. 594; 1 Com. Dig. tit. Appendant & Appurtenant.*

Apples. See tit. *Tithes.*

Application of Money Paid. See tit. *Debtor & Creditor; Surety;*

Appointment. See tit. *Baron and Feme; Churchwarden; Devise; Infant; Limitation of Estate; Overseers; Powers; Remainder.*

Appointment by the Master or Prothonotary.

R. G. H. T. 1791. K. B. & C. P.

On every appointment to be made by the master, the party on whom the same shall be served and required to attend, shall attend such appointment without waiting for a second; or in default thereof, the master shall proceed *ex parte* on the first appointment; but it is of course understood, agreeably to former general rules, that no summons, appointment, &c. shall be made for any time during which the Courts at Westminster shall be sitting.

Apportmentment. See tit. *Baron and Feme, Bills of Exchange and Promissory Notes, Bond, Contract, Covenant, Damages, Frauds, Statutes of, Freight, Insurance, Landlord and Tenant, Master and Servant, Rent, Ship, Spirituous Liquors, Time, Wages.*

Appraisement. See also tit. *Auction and Auctioneer; Distress; Waste;*

1. THRESH V. RAKE. M. T. 1793. N. P. 1 Esp. 53.

In this action it appeared that it had been agreed in writing between the parties that an appraisement of certain fixtures, of which the defendant was to become the purchaser, should be made on the 13th of August, and that a valuation had been made on that day was distinctly averred in the declaration; but it was shown in evidence that the agent of both parties had consented to postpone the valuation till the 14th, and that the appraisement actually took place on that day. It was objected that parol evidence to explain this circumstance could not be admitted; but *per Lord Kenyon*. An enlargement of the times, by the express consent of both parties, can only be deemed a continuance of the original contract, and the evidence proposed is admissible and will prevent a nonsuit on the ground of variance. See *Cuff v. Penn.* 1 M. & S. 21; *Snowball v. Vicaris*, Bunb. 175.

[729] Parol evidence of an enlargement of the time for an appraisement by consent is admissible. Where persons are appointed under an award to value the goods and repairs of a farm, an appraisement

2. LEEDS V. BURROWS. M. T. 1810. K. B. 12 East. 1. S. P. PERKINS V. PORTS. M. T. 1814. K. B. 2 Chit. Rep. 399.

In this case it had been agreed between an outgoing and incoming tenant that an arbitrator should value the hay on the estate, and a spike roll to be

stamp upon
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[73]
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sufficient
under the
46 G. 3. c.
43. an a
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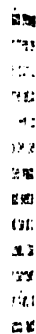
paid for by the defendant, and also estimate the expences of certain repairs to be made and paid for by the plaintiff. The referees prepared a written memorandum in which they stated that having met and examined the hay and spike roll, and considered their value, did appraise and value the same at, &c. On the back of this document, they endorsed a declaration that they had valued the hay and spike roll at a certain amount, and the repairs to be performed by the plaintiff at a smaller sum, which they deducted from the valuation of the hay and spike roll. It was objected that as the instrument settled a right of action for damages to the estate, it should have had affixed to it an award, and not an appraisement stamp. But the Court were of opinion, that as the referees to whom the matter had been referred, were merely authorised to value the articles which the parties had previously consented to pay for, it was an appraisement and not an award within the meaning of the stamp act 43 Geo. 3. 43. *

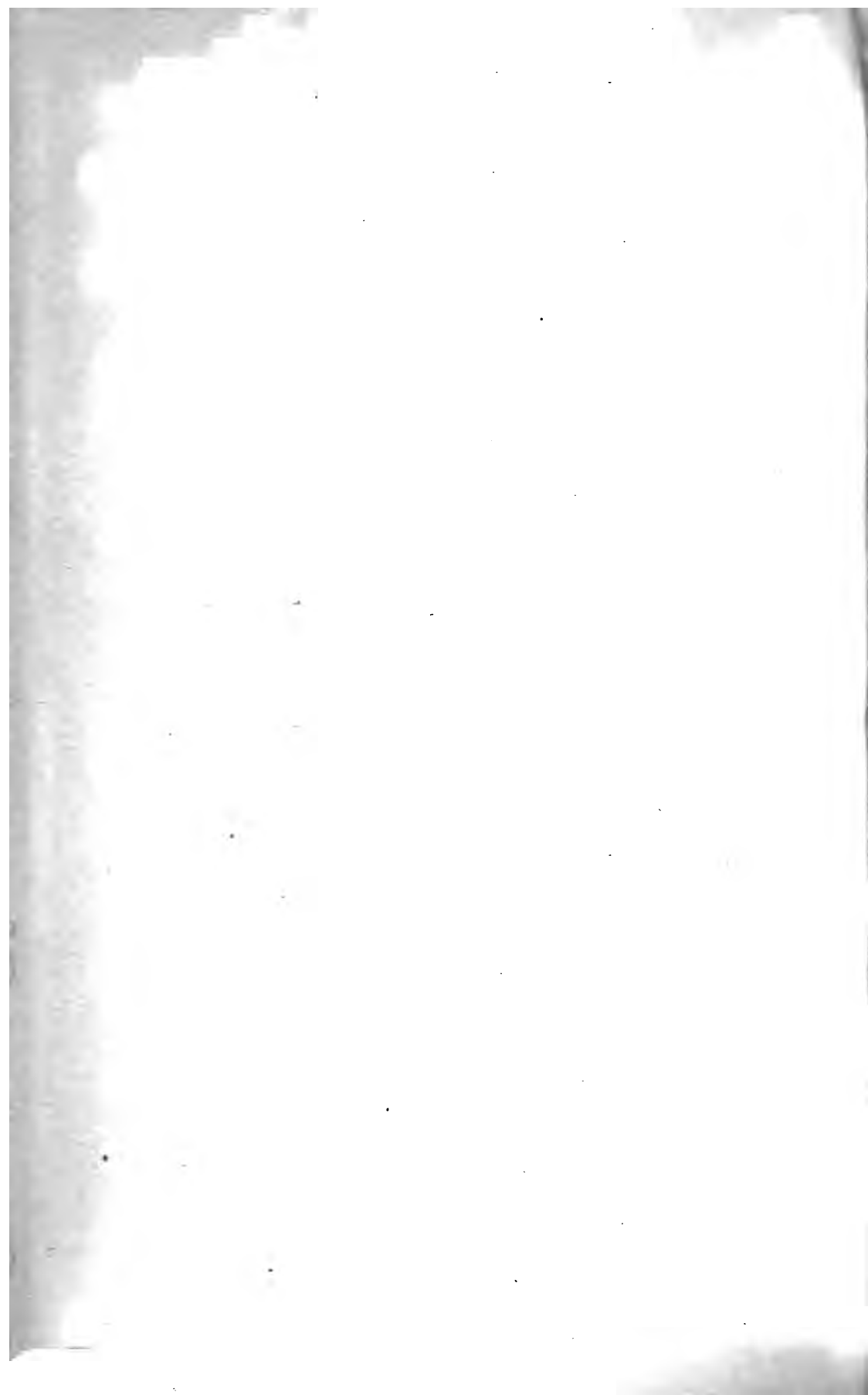
Appraise
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not be
stamped.

3. ATKINSON v. PELL. T. T. 1876. K. B. 5 M. & S. 240.

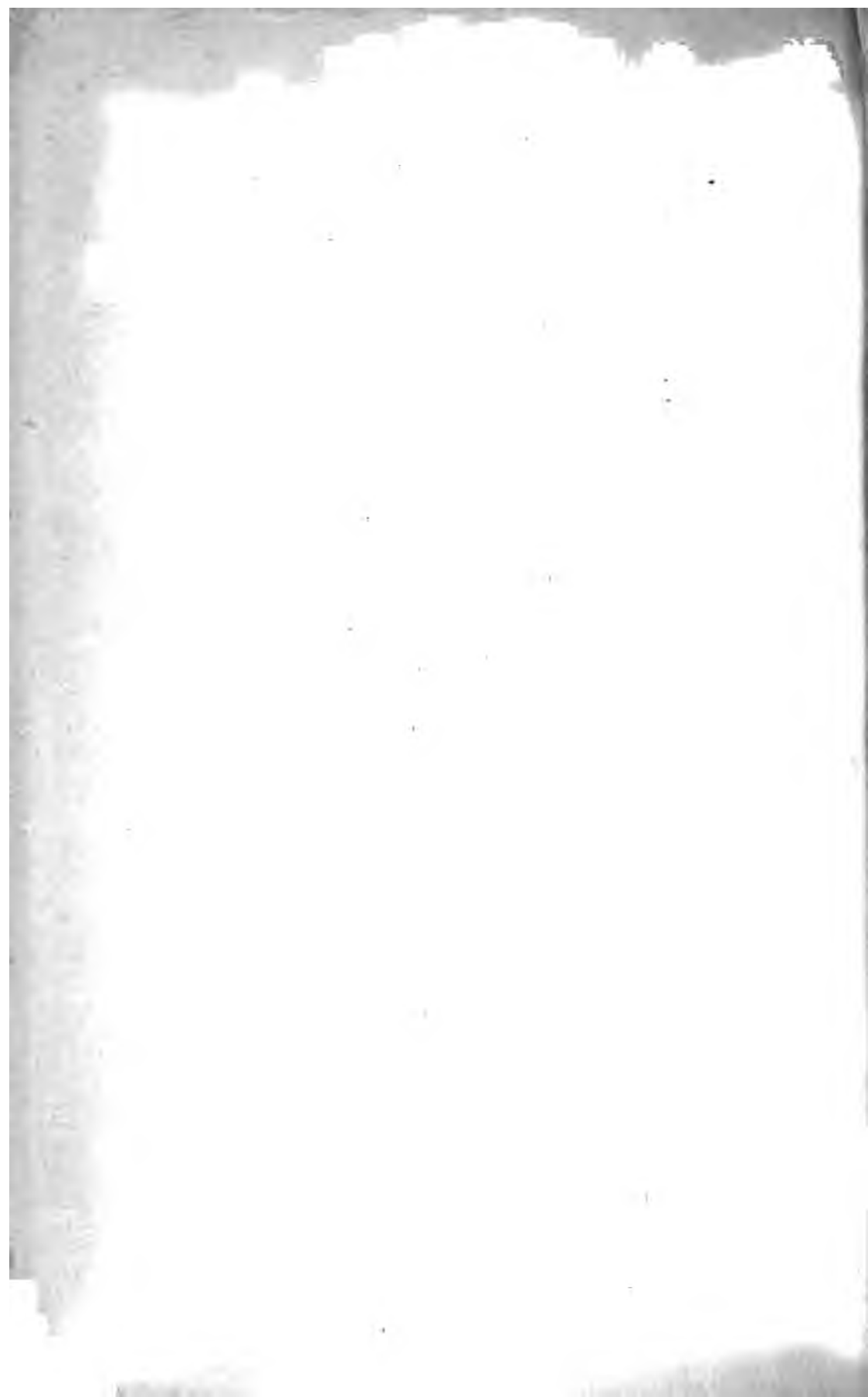
Action against the defendants, who were sidesmen of a parish, for money due to the plaintiff, a farmer resident in the parish, and not a licensed appraiser, for valuing the land therein; in order that the parochial assessment might be more correctly equalized. The valuation had been reduced into writing, but was not stamped. On a motion being made to enter a nonsuit, it was objected that this omission was fatal to the plaintiff's recovery, as an appraisement stamp ought to have been attached to the document. *Sed per Cur.* the express on "valuations or appraisements," does not apply to such valuations as are undertaken merely for the private information of the individuals interested, and not intended to be obligatory upon them; if a contrary doctrine should be adopted, it would follow as an attendant consequence, that in every case where a person is employed to look over the property of another, and the result of his examination is reduced into writing, that document must not only be stamped, but the valuer himself must take out a licence. The distinction is obvious between persons bearing the known and acting in the ostensible character of an appraiser, and other individuals not following that occupation as a business.—Rule refused.

* There is a difference between the words in the 43 Geo. 3. and the stamp act 55 Geo. 3. c. 184. sch. part 1. In the former the words are, "every piece of paper, &c. upon which any valuation or appraisement of an estate, property, effects, real or personal, or any interest or possession, &c. or contingency in any estate, &c. shall be written or set down in figures." In the latter the words are, "appraisement, or valuation of any estate or effects, real or personal, heritable or moveable, or of any interest therein, or of the annual value thereof, or of any dilapidation, or of any repairs wanted, or of the materials and labour used or to be used in any buildings, or of any artificer's work whatsoever."









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